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IN THE

Supreme Court of the United States

RAYMOND ROLEN,
Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DOES SSA'S DISMISSAL NOTICE IN RESPONSE TO AN UNTIMELY FILED "REQUEST FOR HEARING BY ADMINISTRATIVE LAW JUDGE" VIOLATE DUE PROCESS UNDER THE FIFTH AMENDMENT AND CONFLICT WITH PROVISIONS OF THE SOCIAL SECURITY ACT BY ERRONEOUSLY ADVISING A CLAIMANT FOR SOCIAL SECURITY DISABILITY BENEFITS THAT THIS PROCEDURAL ERROR CONSTITUTES A "FINAL" DENIAL ON THE MERITS?

A. Did the Opinion of the Ninth Circuit Court of Appeals Conflict With (Ignore) the Intent of Congress As Set Forth in 42 U.S.C. § 402(j)(5) Which Protects a Claimant's Due Process Rights by Providing Recourse for Rectifying the Proper Date of Entitlement to Benefits Where the Claimant Relied Upon Misinformation Provided by the Social Security Administration?

(1) Did the ALJ's Dismissal Notice Which Stated That the Claimant's Request for Hearing "is Hereby Dismissed and the Reconsideration Determination of March 3, 1992, Remains as the Final Determination of the Secretary. . . ." Constitute Misinformation By Failing to Advise the Claimant that a New Application Could be Filed If the Claimant Was Not Satisfied with the Prior Determination on the Merits of the Disability Claim?

II. WHETHER MR. ROLEN'S REQUEST TO BE GIVEN THE BENEFITS OF A DEEMED EARLIER APPLICATION DATE BECAUSE OF MISINFORMATION PURSUANT TO THE PROVISIONS OF 42 U.S.C. § 405(j)(5), IS REVIEWABLE UNDER 42 U.S.C. § 405(g).

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Raymond Rolen, respectfully petitions this Court to issue a *writ of certiorari* to review the judgment and memorandum disposition of the United States Court of Appeals for the Ninth Circuit filed December 11, 2001. (Pet. App. 2a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Rolen v. Barnhart*, 273 F.3d 1189 (9th Cir. 2001). (Pet. App. 2a). In an unpublished Order filed February 21, 2002, the U.S. Court of Appeals for the Ninth Circuit denied Petitioner's petition for rehearing. (Pet. App. 1a). The underlying opinion of the United States District Court for the Central District of California is not

published and was entered on October 10, 2000. (Pet. App. 6a). The unfavorable Appeals Council decision on own motion review after holding oral argument, was issued on February 24, 1999. (Pet. App. 13a). The favorable decision of the Administrative Law Judge was issued on January 23, 1998, based upon a new application filed on May 8, 1996. (Pet. App. 33a). A Notice of Dismissal and Order of Dismissal of the request for hearing due to untimely filing was issued on July 30, 1992. (Pet. App. 39a).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on December 11, 2001, (Pet. App. 1a), and denied rehearing and rehearing *en banc* on February 21, 2002. (Pet. App. 1a). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5 states:

> "**Criminal actions—Provisions concerning—Due process of law and just compensation clauses**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. § 402(j)(5) provides:

> "In any case in which it is determined to the satisfaction of the Commissioner of Social Security that an individual failed as of any date to apply for monthly

> insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individual's eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of—(A) the date on which such misinformation was provided to such individual, or (B) the date on which such individual met all the requirements for entitlement to such benefits (other than application therefor.)"

42 U.S.C. § 405(b)(3)(A) provides:

> "A failure to timely request review of an initial determination with respect to an application for benefits under this title [42 U.S.C. §§ 401 *et seq.*] or an adverse determination on reconsideration of such an initial determination shall not serve as a basis for denial of a subsequent application for any benefits under this title [42 USCS §§ 401 *et seq.*] if the applicant demonstrates that the applicant, or any individual referred to in paragraph (1), failed to so request such a review acting in good faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination, provided by an officer or employee or the Social Security Administration or any State agency acting under section 221 [42 USCS § 441]. (B) In any notice of an adverse determination with respect to which a review may be requested under paragraph (1), the Secretary shall describe in clear and specific language the effect on possible entitlement to benefits under this title [42 U.S.C. §§ 401 *et seq.*] of choosing to reapply in lieu of requesting review of the determination."

42 U.S.C. § 405(g) (Pet. App. 68a).

20 C.F.R. § 404.630 (Pet. App. 58a).

20 C.F.R. § 404-633 (Pet. App. 50a).

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ALJ Handbook—HALLEX I-2-430 Dismissal—No Right To A Hearing (Revised 06/94) (Pet. App. 74a).

STATEMENT OF THE CASE

On March 1, 1991, Petitioner filed his initial Application for Disability Insurance Benefits based upon a severe back impairment. The application was denied initially on September 11, 1991, and on reconsideration on March 3, 1992. A late request for hearing was filed on May 11, 1992, four days after the 65-day deadline (Pet. App. 43a). The Administrative Law Judge (hereinafter "ALJ") provided petitioner an opportunity to explain the delay which he did by completing a "Statement of Claimant or Other Person" in support of his untimely filing of the Request for Hearing (Pet. App. 48a).

The claim was subsequently dismissed by the ALJ on July 30, 1992, (Pet. App. 39a) because the ALJ found that Mr. Rolen did not provide satisfactory evidence to support a finding of good cause for the delay. The "Order Of Dismissal" stated in the concluding paragraph, ". . . the reconsideration determination of March 3, 1992, remains as the final determination of the Secretary of Health and Human Services herein." (Pet. App. 42a). The Notice failed to advise Mr. Rolen whether there was anything he could do (such as file a new application) to get his claim back on track so he could get a decision on the merits of his disability claim. The dismissal decision only advised Mr. Rolen that if he disagreed

with the ALJ's dismissal action he could appeal to the Appeals Council. The Notice of Dismissal did not state what issues the Appeals Council would consider.

The dismissal decision was not appealed to the Appeals Council. However, on May 8, 1996, petitioner filed a new application. The second application was denied initially and upon reconsideration. A timely request for hearing was filed and a hearing was held on December 9, 1997, at which time petitioner appeared and was represented by attorney Martin Taller. The hearing was continued on January 15, 1998. It was at this continued hearing that petitioner's attorney presented a brief to the ALJ entitled "Brief in Support of Reopening of Prior Initial Denial and Establishing New Application Date Based on May 11, 1992 Untimely Request for Hearing." In this brief, counsel cited a due process error, citing *Gonzlez v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990), and also cited 20 C.F.R. § 404.630 to support recognition of the request for hearing as the basis for a new application date. (The Social Security Administration could not locate the tape of this hearing and no transcript was prepared. However, counsel's brief was part of the administrative record.)

On January 23, 1998, the ALJ issued a decision finding Mr. Rolen entitled to a period of disability commencing October 10, 1989, based on the applications filed on March 1, 1991, and May 8, 1996 (Pet. App. 33a). However, the ALJ did not explain the basis upon which he reopened the prior administrative denial decisions and determined that entitlement could be based on the 1991 application. (Pet. App. 38a).

On March 20, 1998, the Appeals Council sent a letter to the plaintiff, with a copy to his counsel, informing him that on its own motion the Appeals Council has decided to review the hearing decision. On March 30, 1998, counsel sent a letter to the Appeals Council with a copy of the brief that had previously been sent to the ALJ to support the reopening of the prior claim. Thereafter, in a letter dated June 24, 1998, the

Appeals Council notified Mr. Rolen of its intention to adopt the ALJ's conclusion that plaintiff was disabled commencing October 10, 1989. However, the Appeals Council proposed to issue a decision that the ALJ erred in reopening the prior claim and in finding Mr. Rolen entitled to benefits based on the March 1, 1991, application instead of the May 8, 1996, application.

On July 23, 1998, counsel sent a brief to the Appeals Council in response to their June 24, 1998, letter and requested an opportunity to present oral argument. The Appeals Council agreed and oral argument was held and recorded on December 10, 1998, at the Appeals Council in Falls Church, Virginia. Oral Argument before the Appeals Council is a rare event and is only granted "if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision." 20 C.F.R. § 404.976(c).

Counsel, in subsequent briefs to the Appeals Council, and in oral argument, raised petitioner's claim of a due process violation under the due process clause of the Fifth Amendment of the United States Constitution, citing *Gonzalez v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990), and also other issues related to the interpretation and application of certain federal statutes, particularly 42 U.S.C. § 402(j)(5) and 20 C.F.R. § 404.630 and § 404.633.

The Appeals Council, on February 24, 1999, issued a decision (Pet. App. 13a) finding that Mr. Rolen was disabled from October 10, 1989, and was entitled to benefits based on the application filed on May 8, 1996, but found that Mr. Rolen was *not* entitled to benefits based on the application filed on March 1, 1991, and reversed the ALJ's decision which reopened the initial determination on the 1991 application.

Petitioner filed a civil action under 42 U.S.C. § 405(g), including claims based upon 42 U.S.C. § 402(j)(5), 20 C.F.R.

§§ 404.630 and 404.633; and under the due process clause of the Fifth Amendment of the United States Constitution, in the United States District Court on April 20, 1999. After respective motions for summary judgment were filed, the Honorable Elgin Edwards, United States Magistrate Judge, issued a Memorandum Opinion and Order on October 6, 2000, granting the Commissioner's motion to dismiss (Pet. App. 2a), holding that Mr. Rolen did not set forth a colorable constitution claim of a due process violation. Judgment was entered on October 10, 2000 (Pet. App. 5a). A timely Notice of Appeal was filed on October 18, 2000.

The Ninth Circuit Court of Appeals filed a published opinion in this case on December 11, 2001. *Rolen v. Barnhart*, 273 F.3d 1189 (9th Cir. 2001). (Pet. App. 2a).

In an opinion by the Honorable Alex Kozinski, Circuit Judge, the Court held that Mr. Rolen presented a colorable due process claim which conferred jurisdiction on the federal courts to consider reopening the prior claim.

The Court of Appeals referred to the holding of the previous decision of the Ninth Circuit Court of Appeals in *Gonzalez*, *supra*, and stated that to satisfy due process the notice accompanying an Order of Dismissal of a Social Security benefits application "must be reasonably calculated to afford parties their right to present objection," and "[M]oreover the notice must not be so misleading that it introduces a high risk of error into the disability decisionmaking process." *Rolen*, at p. 1191.

The Court of Appeals further held that the notice explaining Mr. Rolen's right to appeal the ALJ's dismissal to the Appeals Council satisfied this standard because it informed Mr. Rolen that he could present objections by seeking review by the Appeals Council. However, the opinion of the Ninth Circuit Court of Appeals failed to even discuss one of petitioner's main contentions that the language advising the petitioner that the prior reconsideration was "the

final determination of the Secretary" was misleading and constituted misinformation. The opinion of the Ninth Circuit Court of Appeals also failed to discuss Mr. Rolen's contention that pursuant to 42 U.S.C. § 402(j)(5) he was entitled to a deemed earlier filing date based upon the date of the July 20, 1992 Order of Dismissal.

The opinion of the Ninth Circuit Court of Appeals also failed to note that the only subject matter discussed in the ALJ's Order of Dismissal was whether good cause was established for filing late. It ignores whether the notice which states "If you disagree with the enclosed order of dismissal, you have the right to appeal" would be likely to inform the claimant that he could appeal the dismissal because he still believed in the merits of his disability claim, even though he did not have good cause for filing late. Also, it ignores whether the Appeals Council would consider the merits of the disability claim on review or limit its review to the issue of whether good cause was presented for filing the Request for Hearing late.

In Petitioner's complaint which was filed in federal court, Mr. Rolen presented two alternative bases for jurisdiction in the federal district court; the first under 42 U.S.C. § 405(g) and the second on the basis of a violation of due process under the 5th Amendment of the United States Constitution.

The basis for federal court jurisdiction to review facts and legal issues relating to Social Security disability claims is generally found in 42 U.S.C. § 405(g) (Pet. App. 68a). The United States Supreme Court, however, has recognized that the federal courts do not have jurisdiction under 42 U.S.C. § 405(g) to review the Commissioner's determination not to reopen a prior Social Security decision absent a colorable constitutional claim. *Sanders v. Califano*, 430 U.S. 99, 109 (1977). Several Circuit Courts of Appeals, including the Ninth Circuit Court of Appeals have held that the federal court has jurisdiction to review a claim requesting reopening

where the claimant has presented a colorable constitutional claim of a due process violation. *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997). *See also Gilbert v. Shalala*, 45 F.3d 1391, 1394 (10th Cir. 1995); *Day v. Shalala*, 23 F.3d 1052, 1065-66 (6th Cir. 1994); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1349-50 (8th Cir. 1993); *Gonzalez v. Sullivan*, supra. The Ninth Circuit Court of Appeals in its decision on this case held that Petitioner, Raymond Rolen, satisfied this standard (Pet. App. 1a), but that his due process claim nevertheless must fail.

REASONS FOR GRANTING THE WRIT

In the opinion of the Court below in this case, *Rolen v. Barnhart*, 273 F.3d 1189 (9th Cir. 2001), the United States Court of Appeals for the Ninth Circuit decided (ignored) an important question of federal law that has not been, but should be, settled by this Court. This question concerns the role of the federal courts in reviewing SSA notices which contain misinformation in order to provide claimants, whose claims have been incorrectly denied or delayed, the relief intended by Congress.

Congress enacted 42 U.S.C. § 402(j)(5) in 1989, which mandates SSA to restore benefits to claimants who are victims of misinformation. This Writ should be granted so that Mr. Rolen and other similarly situated claimants are not damaged by being misled by SSA into erroneously believing that a dismissal of a late request for hearing forecloses any further consideration of a claim on its merits.

Further, the opinion of the Ninth Circuit Court of Appeals conflicts with the emphasis that the United States Supreme Court placed on following congressional intent in determining the manner in which misinformation provided by SSA is to be rectified. *Schweiker v. Hansen*, 450 U.S. 785 (1981). This is because the Court of Appeals ignored the mandate of Congress as set forth in 42 U.S.C. § 402(j)(5). Congress

enacted the amendments under 42 U.S.C. § 402(j)(5) in 1989, after the holding of this Court in *Schweiker, supra.* In *Schweiker, supra*, the Supreme Court held that a Social Security claimant was not entitled to the relief of an earlier deemed application date where the claimant was orally provided incorrect information by a claims representative. Several years after the decision in *Schweiker*, Congress enacted the amendments in 42 U.S.C. § 402(j)(5), in 1989. This provision demonstrates Congress' concern about providing a remedy where a claimant fails to file and/or delays filing an application because of misinformation provided by SSA. Counsel for Petitioner, requested relief for Mr. Rolen based upon these provisions in briefs presented to the Appeals Council, to the District Court, and to the Ninth Circuit Court of Appeals. This important provision in the Social Security Act was ignored and not even mentioned in the opinion of the Ninth Circuit Court of Appeals in this case.

Shortly after enacting the amendments of 42 U.S.C. § 402(j)(5) Congress reconfirmed its interest in rectifying misinformation provided to claimants by adding the provisions of 42 U.S.C. § 405(b)(3)(A) and (B). This provision essentially incorporated much of the relief provided to claimants in the decision of the Ninth Circuit Court of Appeals in *Gonzalez*, *supra*, and other federal courts mentioned in the *Gonzalez* case. The provision states that a previous administrative denial "shall not serve as a basis for denial of a subsequent application for any benefits under this title . . . if the applicant demonstrates that the applicant, or any individual referred to, . . . failed to request such a review acting in good faith, reliance upon incorrect, incomplete, or misleading information relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination . . ."

The misinformation provided by SSA in the Order of Dismissal in the case at bar was just as egregious as the defective notice provided in *Gonzalez, supra.* The misin-

formation is documented in the express language of the Administrative Law Judge who, after finding that good cause was not established by Mr. Rolen for his untimely filing of the Request for Hearing, stated in the concluding paragraph of the Order of Dismissal:

> "For the foregoing reasons it is ordered that the claimant's request for hearing filed herein on May 11, 1992 be and it is hereby dismissed and the reconsideration determination of March 3, 1992 remains as the final determination of the Secretary of Health and Human Services herein." (Pet. App. 42a).

Mr. Rolen established his good faith reliance on this misinformation in his declaration provided as an exhibit to the Appeals Council (Pet. App. 45a), wherein he stated:

> "When I received the judge's Dismissal Decision dated July 31, 1992, I was very distraught. I read the statement in the decision that my request for hearing was dismissed and that "the reconsideration determination of March 3, 1992, remains as the final determination" in my claim and thought that was the end of the claim. I did not re-read the reconsideration decision and did not know about my eligibility to file a new application. I accepted the Judge's words that the prior denial decision was final. Although the decision said that I could appeal to the Appeals Council, the Judge didn't even talk about my disability in his decision so I didn't know what was needed in order to pursue this appeal."

Because the ALJ apparently incorporated the language he used in the Order of Dismissal from a form provided in the ALJ Handbook, HALLEX I-2-415, (Pet. App. 72a), similarly situated claimants throughout the country are likely to also be misled and as a result many individuals may never file a subsequent application regardless of the worthiness of their claim on its merits.

I. THE DISMISSAL DECISION AND ACCOMPANYING NOTICES WERE DEFICIENT AND VIOLATED DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The federal courts, including the United States Supreme Court, have held that a notice regarding a protected interest, such as welfare benefits or Social Security benefits, must be presented in a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). In *Gonzalez v. Sullivan*, supra, the Ninth Circuit Court of Appeals found that an initial adverse determination notice commonly issued by SSA was defective under due process standards because it did not adequately inform the claimant that if no request for reconsideration is made the determination would be final (and result in a probable permanent loss of benefits). The initial notice of the adverse decision in *Gonzalez* included the following language:

> "If you believe that this determination is not correct, you may request that your case be reexamined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request. Please read the enclosed leaflet for a full explanation of your right to question the determination made on your claim.
>
> If you do not request reconsideration of your case within the prescribed time period, you still have the right to file another application at any time."

The Ninth Circuit Court of Appeals explained its rationale for finding the notice to be defective, stating:

> "Requiring notices to accurately state how a claimant might appeal an initial decision does not impose a

> significant financial or administrative burden on the Secretary. . . . Moreover, the form of the notice used here is sufficiently misleading that it introduces a high risk of error into the disability decisionmaking process. . . . One of the fundamental requirements of due process is that a notice must be reasonably calculated to afford parties their right to present objections." (*Gonzalez*, at p. 1203).

The Court noted that several federal jurisdictions have already held that this notice form violates claimants' Fifth Amendment right to procedural due process. *Gonzalez*, at p. 1203.

Similarly, the dismissal notice to Mr. Rolen was misleading. The ALJ's dismissal notice dated July 30, 1992, stated that the request for hearing that he filed "should be dismissed" and "the reconsideration determination of March 3, 1992, remains as the final determination of the Secretary of Health and Human Services herein." (Pet. App. 42a). Although the decision contained information advising Mr. Rolen how he could request review if he disagreed with the ALJ's decision, the ALJ's decision addressed only his findings that Mr. Rolen's reasons for filing late did not constitute good cause. The notice did not advise Mr. Rolen that whether or not he believes that the ALJ's decision on good cause was correct, he could have the merits of his disability claim considered again and receive a new decision by filing a new application.

The district court recognized in its decision that the dismissal notice in this case could likely be interpreted in such a way as to mislead a claimant for disability benefits when it stated:

> "As plaintiff points out, the notice of dismissal stated that he could appeal from the dismissal. In the light most favorable to plaintiff, it would have been apparent that he would lose any appeal (because his request for

> hearing was plainly late, as the ALJ found). Thus, without more, plaintiff might have assumed that his claim had been denied and that he could never again apply for benefits." (Pet. App. 11a).

In the Request for Hearing that Mr. Rolen filed he clearly stated that he believed in the merits of his claim and wanted to submit additional medical evidence and wanted to be heard in person by stating in his own handwriting on the request for hearing form filed on May 11, 1992:

> "I feel that with the introduction of additional medical evidence, along with personal testimony, that Social Security benefits may be granted." (Pet. App. 43a).

Mr. Rolen checked the box indicating that he had additional evidence to submit and he also checked the box noting that he wished to appear at a hearing.

Instead of having his claim reviewed on the merits of his disability claim, Mr. Rolen's claim got diverted because it was filed a few days past the 65 day period provided in the regulations. The ALJ's dismissal decision addressed only the procedural issue of the timeliness and the presence or absence of good cause for filing a late request for hearing. The dismissal notice simply stated, in pertinent part:

> "I find that the declaration of July 3, 1992, does not contain any evidence which would establish good cause to excuse the tardy filing or to extend the time for filing. Hence, the request for hearing should be dismissed pursuant to the sections of the Regulations cited herein.
>
> DISMISSAL
>
> For the foregoing reasons it is ordered that the claimant's request for hearing filed herein on May 11, 1992, be and is hereby dismissed and the reconsideration determination of March 3, 1992, remains as the *final determination* of the Secretary of Health and Human Services herein." [emphasis added]. (Pet. App. 42a).

The Dismissal cover sheet stated that Mr. Rolen had a right to appeal the dismissal to the Appeals Council and also advised him of his right to appoint an attorney. Nothing in the notice advised Mr. Rolen that he could put his claim back on track by filing a new application. The notice did not state what he could do to get the merits of his claim addressed even if he agreed that his reasons for filing the request for hearing late were not very good.

In preparing that dismissal notice the ALJ was probably following the outline under HALLEX I-2-415 Hearing Request Not Timely Filed (Pet. App. 72a). This section of HALLEX states that if the ALJ decides that the claimant did not have good cause, he is to use a particular form, HA-515, and to include in the dismissal order a complete rationale to explain why he or she has found that the claimant has not shown good cause. The decision and the order are then processed like other denial decisions and are sent to the processing center in Virginia awaiting the expiration of the period for Appeals Council review.

This is different than the instructions provided in another section of HALLEX 1-2-430 (Pet. App. 74a), which are to be followed by an ALJ when a request for hearing is premature and filed instead of a request for reconsideration. The hearing office in these cases is instructed to return the file to the district office for further administrative development.

Just as the SSA developed new notice procedures consistent with the ruling in *Gonzalez*, *supra*, and further revised the language in notices in response to the enactment of Section 5107 of the Omnibus Budget Reconciliation Act of 1990, PUB.L. 101-508, 42 U.S.C. § 405(b)(3) A and B; (Also see SSA Acquiescence Ruling AR 92-7(9)) (Pet. App. 70a), the SSA should have similarly introduced meaningful notice language to accompany this type of a dismissal decision.

Petitioner's due process argument is particularly strong in this case because the Commissioner has adopted procedures and Regulations in which it recognizes its responsibility to take affirmative actions, which are necessary to prevent procedural mishaps from blocking a claimant's right to a decision on the merits of the claim. This is acknowledged by 1) The instructions in HALLEX 1-2-430 directing that the claim folder be returned to the field office for further action when a premature dismissal decision is issued, and 2) The Provisions of its own Regulation, 20 C.F.R. § 404.630 in which the burden is placed on the Commissioner to act affirmatively to send a notice to a claimant who has filed a written statement manifesting an intent to claim benefits, advising such individual of the need to file a formal application.

In its proposed decision, the Appeals Council stated, in pertinent part:

> "Similarly, the Appeals Council is unaware of any regulation that requires a notice of dismissal of a request for hearing to notify a claimant of his right to file a new application or to provide a six month protective filing period."

Subsequently, counsel for petitioner pointed out to the Appeals Council that 20 C.F.R. § 404.976, a regulation concerning its very own procedures, provides for a similar notice stating that the Appeals Council "will advise" the claimant in certain circumstances of his or her right to file a new application and use the date of the Request for Review as the protective filing date. 20 C.F.R. § 404.976(b) provides in pertinent part:

> "If you submit evidence which does not relate to the period on or before the date of the administrative law judge hearing decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the additional evidence and will advise you of your right to file a new application. The

> notice returning the evidence to you will also advise you that if you file a new application within 6 months after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits in accordance with § 404.630. If a new application is filed within 6 months of this notice, the date of the request for review will be used as the filing date for your application."

This regulation provides additional guidance for this Court as to the meaning of "due process" in this case and the fact that the type of notice and the procedure petitioner maintains is due him is already recognized by the Commissioner in its own policies, rules and regulations.

While it is recognized that this notice is sent at a different stage of the administrative proceeding, there is no logical difference between these two circumstances with regard to the need to satisfy due process requirements by providing this type of notice to the claimant. This notice advises the claimant of the right to file a new application and further provided that the unsuccessful request for review will constitute a protective filing date for a new application. If SSA requires by regulation that the Appeals Council must provide this notice to claimants, then surely fairness, and due process require that a similar notice be given in the case at bar. This is because a claimant, at the Appeals Council stage, has at least already had a hearing, while Mr. Rolen didn't receive a hearing after his request for hearing was determined to be untimely, although he requested one.

Also, a claimant who files a new application after an untimely request for hearing is dismissed, is likely to be able to preserve all the benefits he would have been entitled to based on his prior application. This is because the untimely Request for Hearing and accompanying new application would toll the 4 year period for reopening of the initial denial of the previously filed application. 20 C.F.R. § 404.988(b). (Pet. App. 62a). Good cause is often established by the

presentation of new and material evidence. 20 C.F.R. § 404.989(a)(1). (Pet. App. 66a). Thus, the claimant who files an untimely Request for Hearing is likely to preserve his entire claim if he is notified and files a new application immediately after the dismissal decision is issued.

II. CONGRESS' ENACTMENT OF 42 U.S.C. § 402(j)(5) DEMONSTRATES THE INTENT OF CONGRESS TO RECTIFY CLAIMS WHICH WERE DELAYED DUE TO MISINFORMATION.

42 U.S.C. § 402(j)(5) was an amendment to the Social Security Act that was in effect when the Administrative Law Judge issued the prior dismissal order on July 30, 1992. The amendment to the Social Security Act reflects Congress' concern about the Social Security Administration providing misinformation to prospective claimants who, as a result, fail to file timely applications. That section provides, in pertinent part:

> "In any case in which it is determined to the satisfaction of the Commissioner of Social Security that an individual failed as of any date to apply for monthly insurance benefits under this title by reason of misinformation provided to such individual by any officer or employee of the Social Security Administration relating to such individuals' eligibility for benefits under this title, such individual shall be deemed to have applied for such benefits on the later of—(A) the date on which such misinformation was provided to such individual, or (B) the date on which such individual met all the requirements for entitlement to such benefits (other than application therefor.)"

Here, the ALJ's Dismissal Decision dated July 30, 1992 as noted above, contained misinformation. Therefore, since the ALJ is "an Officer or employee of the Social Security Administration," according to the provisions of 42 U.S.C.

§ 402(j)(5), Mr. Rolen "shall be deemed to have applied for such benefits" on the July 30, 1992, date of the ALJ's dismissal order.

The Social Security Administration adopted regulations in 20 C.F.R. § 404.633 to effectuate the provisions of 42 U.S.C. § 402(j)(5). This Regulation provides for the recognition of a deemed application where misinformation was provided "in response to a specific request by you to us for information about your eligibility for benefits. . . ." In the case at bar, Mr. Rolen fulfilled the requirements of this regulation because his late request for hearing clearly constituted "a specific request . . . to [SSA] for information about [his] eligibility for benefits."

Thus, Congress expressed its concern that just the type of misinformation cited above could unfairly result in a delay or loss of benefits to a Social Security claimant. In order to provide relief for this type of due process violation, as complained of by Mr. Rolen, Congress enacted 42 U.S.C. § 402(j)(5) and the Commissioner adopted implementing regulations in 20 C.F.R. § 404.633. (Pet. App. 50a). The Commissioner erred and violated Mr. Rolen's due process rights by failing to apply these provisions to this claim.

III. ALTERNATIVELY, MR. ROLEN IS ENTITLED TO FEDERAL COURT REVIEW OF HIS CLAIM FOR A DEEMED EARLIER APPLICATION DATE UNDER 42 U.S.C. § 405(g).

42 U.S.C. § 402(j)(5) mandates a remedy for claimants like Mr. Rolen who fail to apply for Social Security insurance benefits by reason of misinformation. Here, the Appeals Council took own motion review of this case and set the issues presented here for oral argument. In doing so, the Appeals Council recognized that Mr. Rolen raised "an important question of law or policy. . ." 20 C.F.R. § 404.976.

One of the questions presented to the Appeals Council was whether Mr. Rolen was entitled to a deemed earlier filing date by reason of the misinformation he was provided in the dismissal notice, pursuant to 42 U.S.C. § 402(j)(5), and 20 C.F.R. § 404.633.

After the Appeals Council denied his claim, Mr. Rolen filed a complaint in federal district court which set forth as bases of federal court jurisdiction: 20 C.F.R. § 405(g); and alternatively on the basis that the Social Security Administration violated his due process rights under the Fifth Amendment. The complaint further set forth that Mr. Rolen was entitled to the benefits of the protections afforded by Congress under 42 U.S.C. § 402(j)(5).

As noted above, the courts have recognized that the Commissioner's decision whether or not to reopen a prior claim lies within the discretion of the Commissioner, and therefore, it is not reviewable under 42 U.S.C. § 405(g) and would not be reviewable by the federal district court absent a colorable constitutional claim. *Sanders v. Califano*, supra. However, to obtain the relief that Mr. Rolen seeks, it is not necessary for the Commissioner to "reopen" the prior claim in order to provide the relief of a deemed earlier filing date as mandated by Congress in 42 U.S.C. § 402(j)(5). Therefore, no colorable constitutional claim should be required for the district court and Ninth Circuit to hear this claim. Since a claim for relief under 42 U.S.C. § 402(j)(5) requires a determination that the Commissioner provided misinformation, which is akin to a claim that the Commissioner acted improperly to mislead a claimant, it is unlikely that the Commissioner at any level of the administrative process will recognize the agency's own error or misconduct (just as the Appeal Council failed to recognize in this case that language in a notice taken from a form in the ALJ handbook constituted misinformation). Therefore, judicial review under

42 U.S.C. § 405(g) to interpret the provision of 42 U.S.C. § 402(j)(5) and its implementing regulation 20 C.F.R. § 404.633 is all the more necessary.

42 U.S.C. § 405(g) specifically provides for judicial review of questions regarding whether proof submitted by a claimant was in conformity with any regulation as well as review of the validity of such regulations. This Court is therefore respectfully called upon to hold that a claimant is entitled to judicial review under 42 U.S.C. § 405(g), even without a showing of a colorable constitution claim, to review whether the claimant has provided sufficient facts to establish that the Commissioner provided misinformation resulting in the claimant's failure to apply for benefits at an earlier date, and is therefore entitled to a deemed earlier filing date pursuant to 42 U.S.C. § 402(j)(5) and 20 C.F.R. § 404.633.

CONCLUSION

For all the above reasons, petitioner respectfully prays that this Court issue a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,

MARTIN TALLER *
LAW OFFICES OF MARTIN TALLER
2099 S. State College Blvd. #102
Anaheim, California 92806
(714) 385-8100

* Counsel of Record

May 22, 2002

APPENDICES

APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE NONTH CIRCUIT

[Filed Feb. 21, 2002]

No. 00-56877
D.C. No. CV-99-00131-RT

RAYMOND D. ROLEN,
Plaintiff-Appellant,

v.

JO ANNE B. BARNART,
Commissioner of the Social Security Administration,*
Defendant-Appellee.

ORDER

The petition for rehearing is denied and the petition for rehearing en banc is rejected. Fed. R. App. P. 35; Fed. R. App. P. 40.

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* Jo Anne B. Barnhart is substituted for her predecessor, Larry G. Massanari, as Commissioner of the Social Security Administration. Fed. R. App. P. 43(c)(2).

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 11, 2001]

No. 00-56877
D.C. No. CV-99-00131-RT

RAYMOND D. ROLEN,
Plaintiff Appellant,

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,*
Defendant Appellee.

Appeal from the United States District Court
for the Central District of California
Elgin C. Edwards, Magistrate Judge, Presiding

OPINION

KOZINSKI, *Circuit Judge*:

Rolen applied for Social Security disability benefits in 1991, claiming that he had been disabled since 1989. The Administrative Law Judge dismissed his application on procedural grounds. A notice accompanying the dismissal order advised Rolen that "[i]f you disagree with the enclosed

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* Jo Anne B. Barnhart is substituted for her predecessor, Larry G. Massanari, as. Commissioner of the Social Security Administration. Fed. R. App. P. 43(c)(2).

order of dismissal, you have the right to appeal." The notice did not advise Rolen that he could file a new application.

Four years later, Rolen filed a second application for benefits based on the same disability. The Appeals Council upheld the ALJ's finding that Rolen had been disabled since 1989, but declined to hold that the Commissioner should have reopened the 1991 application. As a result, Rolen is entitled to retroactive benefits only for the twelve months before his 1996 application. *See* 20 C.F.R. § 404.621(a)(1)(i). Had the Commissioner reopened Rolen's 1991 application, Rolen would have received approximately five years of additional retroactive benefits. *See id.*

Rolen sought judicial review in district court, claiming that he was denied due process because he was not advised, when his 1991 application was dismissed, that he could have his claim considered on the merits by filing a new application. The district court concluded that it lacked jurisdiction to review the Commissioner's refusal to reopen Rolen's 1991 application.

In this the district court erred. The court has jurisdiction to review the Commissioner's decision not to reopen a final benefits decision if the claimant presents a "colorable constitutional claim of [a] due process violation that implicates a due process right either to a meaningful opportunity to be heard or to seek reconsideration of an adverse benefits determination." *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (internal quotations and citations omitted). A claim is "colorable" if it is not "wholly insubstantial, immaterial, or frivolous." Id. (*quoting Boettcher v. Sec'y of Health & Human Servs.*, 759 F.2d 719,.722 (9th Cir. 1985)). Because Rolen claims that he lost benefits because he was denied due process, and cites arguably relevant caselaw in support of his due process claim, he satisfies this standard. Therefore, the district court had jurisdiction to review the Appeals Council's refusal to reopen the 1991 application.

Though colorable, Rolen's due process claim fails. To satisfy due process, the notice accompanying an Order of Dismissal of a Social Security benefits application "must be reasonably calculated to afford parties their right to present objections." *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (citation omitted): Moreover, the notice must not be so "misleading that it introduces a high risk of error into the disability decisionmaking process." *Id.*

The notice accompanying the order dismissing Rolen's 1991 application satisfied this standard. It informed Rolen that he could present objections by seeking administrative review of the ALJ's dismissal. Thus, it was reasonably calculated to inform Rolen of his right to present objections. Additionally, the notice accurately stated the law, and therefore was not misleading.

We reject Rolen's argument that he was entitled, as a matter of due process, to a notice advising him of his right to file a new application. *Gonzalez* does not require that a notice provide strategic legal advice, or inform claimants about all possible responses to a dismissal. *Gonzalez* merely requires that notices inform claimants of what they must do if they wish to present objections to a dismissal.

The district court did not err in holding that it lacked jurisdiction to review Rolen's challenge to the Appeals Council's holding that 20 C.F.R. § 404.630 does not apply to formal appeals of existing actions. That challenge is not a "colorable constitutional claim of [a] due process violation." *Evans*, 110 F.3d at 1483.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

[Filed Oct. 6, 2000]

Case No. EDCV 99-0131-EE

RAYMOND D. ROLEN,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

JUDGMENT

IT IS ADJUDGED that the action is DISMISSED and that Judgment be entered for the Commissioner and against the plaintiff.

Dated: October 4, 2000.

/s/ Elgin Edwards
ELGIN EDWARDS
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA EASTERN DIVISION

[Filed October 6, 2000]

No. EDCV 99-0131-EE

RAYMOND D. ROLEN,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Defendant.

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS

This order supersedes the order filed October 2, 2000 Plaintiff brought this action pursuant to 42 U.S.C. § 405 (g) of the Social Security Act ("Act") and under the due process clause of the 5th Amendment to obtain judicial review of a final decision of the Commissioner of the Social Security Administration ("Commissioner") denying plaintiff's claim for disability income benefits under Title II of the Act based on an application filed March 1, 1991. Plaintiff filed a motion for summary judgment and defendant filed a motion to dismiss. The parties have stipulated to disposition of this action before the United States Magistrate Judge, pursuant to 28 U.S.C. § 636 (c). The motions were taken under submission after oral argument on September 12, 2000. They are now ready for decision.

This is an unusual case. Plaintiff does not contend that the Commissioner erred in finding him not disabled; on the contrary, the Commissioner did find plaintiff disabled as of October 10, 1989. However, the Commissioner did not make that finding on the application filed March 1, 1991 (or in proceedings while that application was pending), but in another application filed years later on May 8, 1996. In the 1996 case, an Administrative Law Judge ("ALJ") not only found that plaintiff was disabled as of the 1989 date, but the ALJ also reopened the March 1, 1991, application with the effect that plaintiff would have been entitled to disability benefits gong back to the disability date.

The Appeals Council of the Office of Hearings and Appeals, Social Security Administration, on its own initiative, reviewed the ALJ's decision, acquiesced in the finding that plaintiff was entitled to a period of disability going back to 1989, but reversed the ALJ's decision to reopen the 1991 case. The effect of the Appeals Council's decision was to deny plaintiff's entitlement to benefits for about a 5 year period. (Plaintiff is now receiving benefits but seeks back benefits for that period.)

Plaintiff timely filed the complaint herein, and, by the motion for summary judgment, seeks a judgment that the Commissioner be required to adopt the decision of the ALJ (reopening the 1991 claim) or, alternatively, recognize "a May 11, 1992, protective filing date or a July 30, 1992, filing date." Either result would entitle plaintiff to several years of back benefits. The May 11, 1992 date is the date that plaintiff filed a "Request For Hearing by Administrative Law Judge" in connection with the 1991 application. The July 30, 1992 date is the date the ALJ dismissed the request for hearing. The reason for the dismissal was that the request was not filed timely—which is not disputed herein.

In the May 11, 1992 request for hearing plaintiff sought an ALJ review of his earlier denial of disability claim and stated the basis for his claim as follows:

> I feel that with the introduction of additional medical evidence along with personal testimony that Social Security benefits may be granted.

(See plaintiff's motion for summary judgment filed herein April 6, 2000, p. 17, exh. A.[1])

Plaintiff contends that the above statement should have caused the Commissioner to remind plaintiff that he could file a new application with any additional evidence he had. As to the July 30, 1992, dismissal of plaintiff's request for hearing, plaintiff contends that it was misleading because it advised him of his right to appeal but did not advise him of the significance of appealing instead of filing a new application. Specifically, plaintiff was not advised that since the only thing that would be considered on appeal was whether the dismissal was proper, i.e., whether the request for review was late-filed, if plaintiff wanted to have new evidence considered, he would have to file a new application. Plaintiff contends that these failures to notify him of significant information denied him due process, and that his 1991 case should be reopened as relief for this denial.

The Commissioner's motion to dismiss filed June 1, 2000, contends, pursuant to Rule 12 (b) (1), F. R. Civ. P. that this Court lacks jurisdiction to review the Commissioner's refusal to reopen plaintiff's 1991 application during the review of his 1996 application. For reasons that follow, the Court agrees.

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[1] For reasons not of record, exhibits A and B to plaintiff's motion could not be found by the Social Security Administration and were not a part of the administrative record in this case. On plaintiff's motion, the Court ordered them admitted at oral argument to complete the record, and they are now deemed to be a part of the administrative record.

The parties agree that ordinarily this court lacks jurisdiction to review a decision not to reopen a prior, final benefits decision by the Commissioner. Both parties also agree that there is an exception where a claimant challenges the refusal to reopen on constitutional grounds. This exception only applies, however, to a colorable constitutional claim of a due process violation. That implicates a due process right to have a meaningful opportunity to be heard or to seek reconsideration of an adverse benefits determination. *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997).

There is no colorable claim that the Commissioner did any affirmative act to deny plaintiff due process. Instead, plaintiff argues that it was the Commissioner's failure to act that violated rights. Specifically, plaintiff argues that (1) the Commissioner should have reacted to plaintiff's statement in his May 11, 1992 request for hearing by helping plaintiff file a new application effective as of that date, and (2) the ALJ's dismissal dated July 30, 1992 caused plaintiff to err and not file a new application timely.

As to the statement in the request for hearing, plaintiff urges that under the Commissioner's rules codified at 20 C.F.R. § 404.630, the Commissioner should have started a new application using the statement date as the filing date. That regulation does not even purport to create a procedural "right," much less a constitutional due process right. In pertinent part, it provides as follows:

> If a written statement, such as a letter, indicating your intent to claim benefits . . .is filed with us . . ., we will use the filing date of the written statement as the filing date of the application if all of the following requirements are met:
>
> (a) The statement indicates an intent to claim benefits.
>
> (b) The statement is signed by claimant.

> (c) The claimant files an application with us on an application form . . . within 6 months after the date of a notice we will send advising of the need to file and application. . . . .

(20 C.F.R. § 630)

The Appeals Council specifically addressed the regulation and it did not "believe [20 C.F.R. § 630] requires the Administration to treat a formal appeal of an existing application as an intent to file a new application." This interpretation is by far the most reasonable interpretation of the regulation. The interpretation sought by plaintiff would require that any pending case, each time a plaintiff made some statement implying that he had evidence that might support a new application, the Commissioner would have to advise him to do that and then use the date of the statement as the filing date of the new application. As the appeals Council pointed out, "such a procedure would have the effect of encouraging duplicate applications . . . ."

Under well settled principles the administration's interpretation of its own regulations is entitled to deference; thus, even if there were other equally plausible interpretations of the regulation in issue, it could not be said that the Commissioner erred in its application of that regulation. The question, therefore, is not whether a regulation required the Commissioner to treat plaintiff's statement as a filing date for a new application and further required the Commissioner to explain that to plaintiff; rather, the question is whether plaintiff's federal due process rights required the Commissioner to do so. Plaintiff provides no authority, and the Court is aware of none, requiring as a constitutional imperative—such a procedure as plaintiff seeks to impose.

Turning to the contention that the ALJ's dismissal dated July 30, 1992 caused plaintiff to err and not file a new application timely, plaintiff cannot make colorable claim that

a due process violation occurred. The dismissal was based on plaintiff's failure to timely ask for a hearing. As plaintiff points out, the notice of dismissal stated that he could appeal from the dismissal. In the light most favorable to plaintiff, it would have been apparent that he would lose any appeal (because his request for hearing was plainly late, as the ALJ found). Thus, without more, plaintiff might have assumed that his claim had been denied and that he could never again apply for benefits. He now contends that the dismissal should have informed him not only that he had a right to appeal, but that he also had a right to file a new application and raise claims in the new application that he could not raise in an appeal.

The closest authority cited in support of plaintiff's contention is *Gonzales v. Sullivan*, 914 F.2d 1198 (9th Cir. 1990). *Gonzales* involved a claim where the claimant had been initially denied benefits and had been notified that he could seek reconsideration or file a new application. When he filed a new application, he only then learned that by not seeking reconsideration, he had permitted his earlier claim to become final, and the finding that he was not disabled was binding based on *res judicata* principles. The invitation to file a new application was, in essence, a trap, because it did not warn *Gonzales* of any downside of not seeking reconsideration. The notice in *Gonzales* read, in part:

> If you believe that this determination is not correct, you may request that your case be reexamined. . . . If additional evidence is available, you should submit it with your request . . . .If you do not request reconsideration of your case within the prescribed time period, you will still have the right to file another application at any time.

(Gonzales v. Sullivan, 914 F.2d at 1203.)

The notice was deceptive in that it made it appear that seeking reconsideration and filing a new application were

simply equivalents and that *Gonzales* would not lose any advantages by ignoring the right to seek reconsideration. It suggested that if Gonzales had additional evidence, he could, at his option, present it in a request for reconsideration or in a new application.

In the present case, the alleged defect in the notice is much more subtle. Plaintiff does not contend that the ALJ affirmatively advised him that he could not file a new application. Nor does he point to any representation even implying that plaintiff could not do so. Plaintiff argues instead that by telling plaintiff that he had a right to appeal, the notice was deceptively silent about the fact that plaintiff could file new application.

Again, plaintiff cites no authority that the mere silence of the dismissal about plaintiff's right to file a new application instead of, or in addition to, filing an appeal was a violation of his constitutional due process right. Plaintiff was put in no worse legal position by abiding by the notice of dismissal (and electing to appeal or not appeal) than he was in before the notice issued. He was free at any time to file a new application. That he did not do so for several years might have resulted from his own belief that the ALJ had not given him any option to file a new application, but there was nothing in the notice that justified such a belief.

For the foregoing reasons, plaintiff's motion for summary judgment filed April 6, 2000 is DENIED, and the Commissioner's motion to dismiss filed June 1, 2000, is GRANTED. Judgment shall be entered accordingly.

Dated: October 4, 2000

Elgin Edwards
United States Magistrate Judge

APPENDIX E

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHBN
573-66-8753

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA22041-3255

[February 24, 1999]

NOTICE OF UNFAVORABLE APPEALS COUNCIL DECISION

Mr. Raymond D. Rolen
P.O. Box 720172
Pinon Hills, CA 92372

Dear Mr. Rolen:

Enclosed is a copy of the decision of the Appeals Council on your claim under the Social Security Act.

If you agree with the enclosed decision, it is not necessary that you take any further action. The decision will be put into effect shortly and you will be notified.

If you desire a court review of the enclosed decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. [Pursuant to Public Law No. 103-296, the Social Security Independence and Program Improvements Act of 1994, the Social Security Administration became an independent Federal agency effective March 31, 1995, and the final decision subject to judicial review is now the final decision of the Commissioner.] The right to court review is

provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) for claims under Title II and in section 1631(c) (3) of the Act (42 U.S.C. 1383(c) (3)) for claims under Title XVI.

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. [Although 20 CFR 422.210(d) specifies that the proper defendant in a civil action seeking judicial review of the final decision in a Social Security claim is the Secretary of Health and Human Services, effective March 31, 1995, the proper defendant consistent with Public Law 103-296 is the Commissioner of Social Security.] (See Rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the District in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

If you have any questions, your Social Security office will be glad to help you.

Sincerely yours,

Ellan R. Hylton
Administrative Appeals Judge

Enclosure

cc:
Martin Taller
Attorney At Law
2099 S. State College Blvd. #102
Anahiem, CA 92806

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	**Claim for**
Raymond Rolen (Claimant)	Period of Disability Disability Insurance Benefits
(Wage Earner)(Leave blank if same as above)	573-66-8753 (Social Security Number)

Own Motion Review of the Decision of Dennis T. Bennett, Administrative Law Judge, Social Security Administration.

Martin Taller, Esq., Anaheim, California for the claimant.

Before HYLTON, BOBOWSKI, and WHITE, Administrative Appeals Judges. HYLTON, Administrative Appeals Judge:

On March 20, 1998, the Appeals Council notified the claimant and his representative that it had decided, on its own motion, to review the hearing decision dated January 23, 1998. In the hearing decision, the Administrative Law Judge found that the claimant was entitled to a period of disability and disability insurance benefits with an established onset date of October 10, 1989. Additionally, "on motion of the attorney and for good cause shown," the Administrative Law Judge reopened and awarded benefits on the claimant's prior application filed on March 1, 1991 (the 1991 application).

In a subsequent notice dated June 24, 1998, the Appeals Council advised the claimant and his representative that it proposed to issue a decision affirming that the claimant is entitled to a period of disability and disability insurance benefits beginning October 10, 1989. The Council further indicated that the Administrative Law Judge's reopening of

the unfavorable final determination on the claimant's 1991 application constituted an error of law. The Council advised that it would rectify this reopening error and find entitlement based on the claimant's application filed on May 8, 1996 (the 1996 application).

In response to these notices, the Appeals Council received from the claimant's representative correspondences dated March 30, 1998, and July 23, 1998. In the latter document, the representative contended that the issues being addressed raised important questions of law and policy and requested that the Appeals Council consider setting the matter for oral argument.

In a response dated November 13, 1998, the Appeals Council granted the appearance request and selected the following issues for oral argument:

1. What due process is required in an Order of Dismissal? Are the notice requirements in *Gonzalez v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990), relevant to that determination, and if so, why?

2. Should the date of an untimely request for hearing be treated as a written statement that can serve as a protective filing date consistent with 20 CFR 404.630 and 416.340?

3. Could the failure to inform a claimant that he/she may reapply for benefits constitute misinformation as defined in 20 CFR 404.633 and 416.351 for purposes of establishing a deemed filing date?

An appearance before the Appeals Council was held on December 10, 1998, at the Office of Hearings and Appeals in Falls Church, Virginia. At the time of the appearance, the representative submitted a brief dated December 8, 1998; a final brief dated January 8, 1999, was received subsequent to the appearance: to address questions raised in the oral proceedings. These briefs, as well as the Appeals Council's

notices, have been entered into the record and are listed on the supplemental list of exhibits appended to this decision.

The relevant history of this case concerns only the issue of whether the Administrative Law Judge could find that the claimant is entitled to benefits based on his 1991 application. The Appeals Council takes no issue with the finding of a period of disability beginning October 10, 1989, and affirms that disability onset in this decision. In his 1991 application for a period of disability and disability insurance, benefits, the claimant indicated that he had been disabled since October 10, 1989. That claim was initially denied on September 11, 1991, and was again denied upon reconsideration on March 3, 1992. A request for hearing was filed on May 11, 1992. It was dismissed by an Administrative Law Judge on July 30, 1992, because it was not filed within the prescribed appeal period and the claimant did not establish good cause for late filing. The claimant did not appeal the dismissal and took no further actions until he filed the 1996 application for a period of disability and disability insurance benefits, again indicating that his disability began on October 10, 1989. This claim was also denied through the reconsideration level. The Administrative Law Judge issued a decision on January 23, 1998, finding that the claimant had been disabled since October 10, 1989. He also found good cause for reopening the unfavorable determination issued on the claimant's 1991 application. The Administrative Law Judge did not provide any rationale for the finding of "good cause" to reopen on the prior application.

A review of the appropriate regulations establishes that the issue of "good cause" for reopening, as set forth in 20 CFR 404.987-989, is not relevant to this case. A determination on an application for a period of disability and disability insurance benefits may be reopened within four years of the date of the notice of initial determination if good cause is found (20 CFR 404.988). In the case at hand, the initial determination on the claimant's 1991 application was issued

on September 11, 1991. The 1996 application was not filed until May 8, 1996. Because these dates are separated by more than four years, reopening of the final determination on the 1991 application based on a finding of good cause is not possible, and it was an error of law to reopen on this basis. (The regulations instruct that a determination may be reopened at any time for various other reasons (20 CFR 404.988(c)); however, none of those reasons apply to this case and they will not be discussed in this decision.)

The claimant's representative, both in oral arguments and in briefs submitted to the Appeals Council, contends that there are other reasons to support awarding the claimant benefits based on the 1991 application. Those arguments are addressed below.

Case Law and Due Process Notice Requirements

Relying on *Gonzalez v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990), a case that would offer mandatory precedent were it on point, the claimant's representative argues that the claimant's procedural due process rights have been violated. Prior to *Gonzalez*, notices that the Social Security Administration released to explain unfavorable determinations advised claimants of their right both to appeal the unfavorable action and to file a new application for benefits. However, no language appeared in such notices to explain that deleterious consequences could result from not pursing the administrative review process. In *Gonzalez*, the Court held that one of the fundamental requirements of procedural due process is that a notice must be reasonably calculated to afford parties their right to present objections. It found that the language offering such an option was misleading, and introduced a high risk of error into the disability decisionmaking process.

Subsequent to the Court's decision, the Agency revised the language that the Court considered to be misleading. The Appeals Council observes that the language addressed in *Gonzalez* as misleading does not appear in any of the notices

sent to the claimant in the instant case. Both the initial and reconsideration denial notices issued in conjunction with the 1991 application explained the differences, and potential consequences, between filing an appeal and filing a new application. They satisfy *Gonzalez*.

The representative has further argued that the claimant in the instant case has an even stronger claim than that of the claimant in *Gonzalez*. The basis for this contention is that the claimant in *Gonzalez* received "a decision on the merits of his application. . . ," whereas the claimant in the instant case was "diverted by technical procedural requirements."

The representative's argument seems to focus on the *Gonzalez* language addressed above when he argues that the notice with the Order of Dismissal, "created a high risk of error and indeed caused [the claimant] to err . . . by not filing until several years later. . . ." In essence, the representative seems to be arguing that because the cover notice accompanying the dismissal order did not advise the claimant that he could file a new application, it was misleading. Counsel supports this contention by suggesting that the scenario not addressed is the one that arises when the claimant concurs with the Administrative Law Judge that he did not have good cause for appealing outside his appeal period, but nonetheless believes he is entitled to a substantive decision on the merits of his disability claim. The representative argues that even if the claimant were to request Appeals Council review in this instance, the Appeals Council would only consider whether the Administrative Law Judge's action in dismissing the request for hearing was consistent with regulatory requirements. As such, the Council would not address the substantive issue of disability, hence its action would not offer the quantum of relief that would be provided were the claimant to file a new application for benefits.

In the opinion of the Council, this argument goes beyond the holding in *Gonzalez* and offers unsubstantiated speculation

regarding an outcome. Consideration of whether an Administrative Law Judge's order of dismissal can be sustained involves considerably more than the isolated analysis that counsel suggests. Review by the Appeals Council is not limited to a mechanical evaluation of the basis for the Administrative Law Judge's dismissal; it also considers the claimant, his or her physical and mental impairments or limitations, and many intangibles. If the Council decides to remand the case for further consideration, this usually also requires that the Administrative Law Judge evaluate the substantive matter at issue. Pursuing the administrative review process established in the regulations ensures the integrity of that process. Because it is not possible to predict how the Appeals Council will rule in any given case where a request, for review of a hearing level dismissal is at issue, it would create a costly inefficiency to circumvent the established administrative review process. Following the process, on the other hand, ensures that procedural due process is protected, particularly for unrepresented claimants.

A landmark case on the subject of procedural due process, *Goldberg v Kelly*, 397 U.S. 254 (1970), articulated factors which became the three-pronged test recited in *Matthews v. Eldridge*, 424 U.S. 319 (1976), in deciding that the extent to which procedural due process must be afforded is influenced by the extent to which the individual may be condemned to suffer grievous loss. The *Matthews* test considers and, to some extent, compares the private interest that will be affected, the risk of erroneous deprivation through the procedures used and the government's interest (which also includes the fiscal and administrative burdens the additional or substitute procedural requirements. would entail). A case more recent than any of the others considered, *Day v. Shalala*, 23 F.3d 1052, (6th Cir. 1994), in addressing the requirements of notices in the context of the *Goldberg v. Kelly* requirements, emphasized the importance of not

imposing on the Federal Government any procedural requirements beyond those demanded by rudimentary due process. *Gonzalez*, in the opinion of the Appeals Council, does not offer any guidance in the situation that counsel has posed.

The Appeals Council does not believe the language in either the cover notice or the dismissal order was misleading or created a high risk of error. Moreover, the Council does not believe the language violated the *Gonzalez* requirement and basic holding that "a notice must be reasonably calculated to afford parties their right to present objections." Moreover, the Council is of the opinion that the established administrative review process in dismissal cases, which implicitly directs the claimant to pursue his/her appellate rights, satisfies all rudimentary requirements of procedural due process, and constitutes the most efficient and equitable approach.

Untimely Request for Hearing as a Written Statement for Protective Films Purposes

As an alternative argument, the claimant's representative has maintained that the claimant's untimely request for hearing constitutes a written statement of intent to file an application, and that it was incumbent upon the Social Security Administration to treat the date of the request for hearing as a protective filing date for a new application, consistent with 20 CFR 404.630. 20 CFR 404.630 requires that when a claimant submits a written inquiry that constitutes an intent to apply for benefits, the Agency is required to give him/her a notice that if he/she, within six months from the date of the notice, files an application, the date of the protective writing will be used as the date of the formal application.

A request for hearing is filed in pursuit of an active claim. The Appeals Council does not believe the above regulation requires the Administration to treat a formal appeal of an existing application as an intent to file a new application.

Indeed, such a procedure would have the effect of encouraging duplicate applications when a timely appeal is pending. Although the representative further clarified his position to limit such protective filing status only to untimely filed requests for hearing (Exhibit AC-5), the Appeals Council does not find any basis in the regulations or relevant legislative history for affording special protective filing status to untimely appeals.

The representative also argues that treating an untimely request for hearing as a protective filing statement is similar to the situation in which the Appeals Council treats a request for review of a hearing decision as a written statement indicating an intent to file benefits (Exhibit AC-5). Pursuant to 20 CFR 404.976(b), the Appeals Council offers protective filing, as of the date the request for review was filed, when an individual submits, with the request for review, additional evidence that does not relate to the period on or before the date of the hearing decision. However, the Appeals Council is precluded from considering additional evidence if it does not relate to the period on or before the date of the hearing decision (20 CFR 404.970(b)). This regulatory provision prevents a potential loss of benefits to individuals who progressed to the final stage of the administrative review process within the appropriate time periods and became disabled during the interval between the date of the hearing decision and the claimant's receipt of the Appeals Council action on his/her request for review. Numerous distinctions can be made between cases which have been dismissed at the hearing level because the claimant failed to follow proper procedures and cases in which the claimant complies with regulatory requirements. That may explain why a regulation affords relief to those in the latter category. At any rate, the existence of a regulation explains why the Agency treats the two categories of claimants differently.

Failure to Inform a Claimant of the Right to File a New Application as Misinformation

The claimant's representative further contends that the hearing dismissal order contained misinformation pursuant to 42 U.S.C. §4020(j) (5), which has been codified in 20 CFR 404.633. Counsel states that the regulations recognized a deemed application where the misinformation was provided "in response to a specific request by you to us for information about your eligibility for benefits..." (Exhibit AC-8). Counsel argues that the dismissal decision was incomplete in that "there was an omission of any advice to the claimant regarding how he could reinstate his claim on the merits," and because the claimant was misled by the dismissal order language indicating that the prior denial decision was final (Exhibit AC-7).

In setting forth circumstances in which misinformation may have been provided, 20 CFR 404.633(a) states, in pertinent part, that "you may have considered applying for monthly benefits . . . and you may have contacted us in writing, by telephone or in person to inquire about filing an application for these benefits." In responding to this inquiry, "we may have given you misinformation about your eligibility for such benefits . . . which caused you not to file an application at that time." The regulation describes a situation in which an individual takes affirmative action to investigate eligibility for benefits but did not file an application as a result of receiving incorrect 'information' about eligibility. The Council views this as distinctly different from the situation in which an individual filed an application, received proper determinations that included correct information about appeal rights, but then did not pursue such rights.

The Council does not find the sequence described by counsel to constitute misinformation within the context addressed in this regulation. The cover letter accompanying the dismissal order detailed the claimant's right to request review by the

Appeals Council, and, as discussed above, this approach could well lead to consideration of the merits of the claim. Further, the Council does not believe the claimant was misled by the order's language that the reconsideration determination of March 3, 1992, constituted the final determination on the application.

The representative also contends that enactment of 42 U.S.C. §4020) (5) "demonstrates the intent of Congress for a liberal policy in rectifying claims which were delayed due to misinformation" (Exhibit AC-8). In this brief, counsel restated a portion of the House Conference Report to support the position that the "legislative history supports an even broader interpretation of recognizing a deemed application based on information." However, the language from the conference agreement that was recited by counsel appears nearly verbatim in 20 CFR 404.633. Therefore, the Appeals Council finds no reason to conclude that Congress intended an interpretation of misinformation that is somehow "broader" than that embodied in its own legislative history.

Good Cause for Not Filing a Timely Appeal of the Dismissal in the 1991 Application

Additionally, the claimant's representative has contended that the claimant has good cause for failing to timely file a request for review of the July 30, 1992 dismissal pursuant to Social Security Ruling 91-5p (SSR 91-5p) (Exhibit AC-8). Under this ruling, the Social Security Administration must determine whether good cause exists for extending the time to request an appeal when a claimant presents evidence that mental incapacity prevented him from timely requesting review of an adverse determination or dismissal, and the claimant had no one legally responsible for prosecuting the claim (e. g., an attorney or other legal representative). In making this determination, the Administration will consider what circumstances kept the claimant from making the request on-time, whether he/she was misled, did not understand the

requirements of the Social Security Act, or had any physical, mental, educational or linguistic limitations which prevented him/her from filing a timely appeal (20 CFR 404.911). If the claimant satisfies the substantive criteria, the time limits in the reopening regulations do not apply and the claimant can establish good cause for extending the deadline to request review of that action.

In support of the claimant's position, the representative references reports in which various psychologists and psychiatrists have diagnosed the claimant with a, dysthymic disorder with depressed mood and somatic preoccupations. Counsel acknowledges that although the claimant's mental incapacity was not considered to be severe, it was categorized as significant, and could likely have resulted in a delay in requesting review (Exhibit AC-8).

Review of the evidence of record establishes that the claimant sought intermittent treatment for a mental impairment; psychological testing on March 19, 1992, however, revealed him to be "a very intelligent and complex man" (Exhibit B-1F, page 187). After reviewing it from the perspective addressed in SSR 91-5p, the Appeals Council is of the opinion that the evidence of record does not support presence of a mental impairment of such severity as to preclude the claimant from pursuing a timely appeal and, in fact, the claimant himself did not suggest this when he had the opportunity to do so. In response to a good cause request from the Administrative Law Judge, the claimant did not indicate that his condition somehow prevented him from filing a timely appeal, only that he had hoped to be able to return to work and also that he had been out of town. Similarly, the Council does not believe the claimant was misled, as the dismissal notice clearly explained his right to appeal within 60 days. Therefore, the Appeals Council finds no good cause for extending the deadline to file an appeal under either SSR 91-5p or 20 CFR 404.911.

The claimant's request for an extension of time under SSR 91-5p was accompanied by a request for review dated December 17, 1998. As all the issues potentially raised by that appeal have been addressed in this own-motion action, the request for review is merged into this Appeals Council decision. Accordingly, a separate notice will not be issued for the request for review.

The Agency's Disparate Treatment of Untimely Requests for Hearing and Prematurely Filed Requests for Hearing

The claimant's representative recommends revisions to HALLEX 1-2-415, which provides instructions for the handling of untimely requests for hearing. Counsel contends that requests for hearing which are dismissed as untimely filed should be handled in the same manner as prematurely filed requests for hearing. Currently, when an individual files a request for hearing but has not exhausted all earlier administrative procedures, the request for hearing is dismissed (HALLEX I-2-430). The file is then returned to the local field office for further development, which generally involves obtaining and processing the proper appeal form. Counsel suggests that, following a dismissal based on untimeliness, the claim file should be returned to the field office for "further development on the merits of the claim, including the processing of a new application with the date of hearing constituting the protective filing date. In the event that the claimant [requests Appeals Council review of the order. of dismissal], duplication of only that part of the folder dealing with the good cause issues could be forwarded to the proper processing center" (Exhibit AC-7). Counsel's rationale for this bifurcated process is that the Appeals Council would likely address only the "good cause" issue. Counsel suggests that such a procedure would represent only a "de-minimis administrative action" (Exhibit AC-8).

The Appeals Council observes that there are significant differences between a prematurely filed request for hearing

and one that is untimely filed. The former involves a case in which an individual took affirmative action in a timely manner to pursue an appeal, but filed the incorrect form, most likely because a Social Security Administration employee misunderstood where the claimant was in the administrative review process. Under these circumstances, returning the file to the local field office to obtain the proper form for a pending appeal is neither unreasonable nor extraordinary. An untimely request for hearing is simply that; the individual failed to act within established time constraints and, absent good cause for the failure, dismissal is the proper response.

The Appeals Council disagrees that the proposed bifurcated process would represent only a "de-minims administrative action." The end result of the recommended process would be to separate or duplicate, a claim folder so that an appeal of a hearing dismissal could be processed by one component while a new application "on the merits" is simultaneously processed by another component. In addition to constituting a high administrative cost, this approach seriously compromises the integrity of the administrative review process. And, as discussed earlier, a request for review of an order of dismissal encompasses more than just the good cause issues.

Summary and Conclusions

The Appeals Council adopts the Administrative Law Judge's statements as to the pertinent provisions of the Social Security Act and Regulations, the issues in the case, and evidentiary facts. The Appeals Council further adopts the Administrative Law Judge's findings and conclusions with respect to the nature, onset, and severity of the claimant's medical impairments, the issue of disability, and the basis for such disability. The Appeals Council does not adopt the Administrative Law Judge's conclusion with respect to the reopening of the final, unfavorable determination on the 1991 application. The Appeals Council concludes that there is no

basis in the Act, regulations, rulings, or case law for awarding benefits based on the 1991 application. Therefore, the Appeals Council reverses the reopening action taken by the Administrative Law Judge in the hearing decision of January 23, 1998.

Accordingly, the Appeals Council finds that the claimant has been disabled since October 10, 1989, and that he is entitled to a period of disability and disability insurance benefits on the basis of the 1996 application filed May 8, 1996.

FINDINGS OF THE APPEALS COUNCIL

The Appeals Council has considered the entire record and makes the following findings:

1. The claimant filed an application for a period of disability and disability insurance benefits on March 1, 1991. That application was denied initially on September. 11, 1991, and was again denied upon reconsideration on March 3, 1992. A request for hearing was filed on May 11, 1992. It was dismissed by an Administrative Law Judge on July 30, 1992, because it was not filed within the prescribed appeal period and the claimant did not establish good cause for late filing. The dismissal was not appealed.

2. The claimant filed another application for a period of disability and disability insurance benefits on May 8, 1996. This application was denied at the initial and reconsideration levels. The Administrative Law Judge issued a decision on January 23, 1998, finding that the claimant had been disabled since October 10, 1989. The Administrative Law Judge also found good cause for reopening the unfavorable determination issued on the claimant's 1991 application, and awarded benefits on the basis of the 1991 application.

3. On March 20, 1998, the Appeals Council notified the claimant and his representative that it had decided, on

its own motion, to review the hearing decision. The Council proposed to issue a decision affirming the Administrative Law Judge's findings with respect to the claimant's disability, but reversing the reopening of the 1991 application based on the operation of an error of law.

4. Pursuant to 20 CFR 404.987-989, a determination on an application for a period of disability and disability insurance benefits may be reopened within four years of the date of the notice of initial determination if good cause is found. The initial notice on the claimant's 1991 application was issued on September 11, 1991. The 1996 application was filed May 8, 1996. Thus, reopening of the final determination on the 1991 application based on a finding of good cause is not possible.

5. The reconsideration notice dated March 3, 1992, which stands as the final determination of the Commissioner on the 1991 application, properly advised the claimant of his right to pursue an appeal or file a new application. The notice further explained the possible consequences of not pursuing the appellate process, satisfying the standard set forth in *Gonzalez v. Sullivan*, 914 F. 2d 1197 (9th Cir. 1990)

6. The claimant has not established good cause for extending the deadline to file an appeal under Social Security Ruling 91-5p or 20 CFR 404.911.

7. There is no basis in the regulations, rulings or case law for awarding benefits based on the application file March 1, 1991

8. The claimant has been disabled since October 10, 1989, and is entitled to a period of disability and disability insurance benefits on the basis of the application filed May 8, 1996

DECISION

Based on the application filed on May 8, 1996, the claimant is entitled to a period of disability on October 10, 1989, and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act. The claimant is not entitled to benefits based on the application filed March 1, 1991, and the Administrative Law Judge's prior reopening of the final determination on the 1991 application is hereby reversed.

In accordance with the instructions on the appended cover letter, the claimant may request court review of this decision. Absent a Constitutional challenge, however, a final decision by the Commissioner refusing to reopen a claim for benefits is not subject to review. *Califano v. Sanders*, 430 U.S. 99 (1977).

APPEALS COUNCIL

/s/ Ellan R. Hylton
ELLAN R. HYLTON
Administrative Appeals Judge

/s/ Dianne Egan Bobowski
DIANNE EGAN BOBOWSKI
Administrative Appeals Judge

/s/ Richard F. White
RICHARD F. WHITE
Administrative Appeals Judge

SUPPLEMENTAL LIST OF EXHIBITS

AC-1. Memorandum dated February 25, 1998, from the Office of Disability and International Operations

AC-2. Appeals Council notice of own motion dated March 20, 1998

AC-3. Correspondence dated March 30, 1998, with attachment, from Martin Taller, Esq.

AC-4. Appeals Council notice of proposed action dated June 24, 1998.

AC-5. Brief dated July 23, 1998, from Martin Taller, Esq.

AC-6. Appeals Council notice dated November 13, 1998, granting request for appearance.

AC-7. Brief dated December 8, 1998, form Martin Taller, Esq.

AC-8. Brief dated January 8, 1999, with attachments, from Martin Taller, Esq.

AC-9. Request for Review dated December 17, 1998, from Raymond Rolen.

AC-10. Transcript of hearing held December 9, 1997, at the Office of Hearings and Appeals in San Bernardino, Ca.

AC-11. Transcript of Appeals Council Appearance held December 10, 1998, at the Office of Hearings and Appeals Headquarters in Falls Church, Va.

APPENDIX F

SOCIAL SECURITY ADMINISTRATION

Office of Hearings and Appeals
Refers to: 573-66-8753
605 N Arrowhead Ave, 200
San Bernardino, CA 92401
Telephone: (909) 383-5545
Date: JAN 23, 1998

Raymond D. Rolen
PO Box 720172
Pinon Hills, CA 92372

NOTICE OF FAVORABLE DECISION

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

This Decision Is Fully Favorable To You

Another office will process the decision and send you a letter about your benefits. Your local Social Security office or another office may, first ask you for more information. If you do not hear anything for 60 days, contact your local office.

The Appeals Council May Review The Decision On Its Own Motion

The Appeals Council may decide to review my decision even though you do not ask it to do so. To do that, the Council must mail you a notice about its review within 60 days from the date shown above. Review at the Council's own motion could make the decision less favorable or unfavorable to you.

If You Disagree With The Decision

If you believe my decision is not fully favorable to you, or if you disagree with it for any reason, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative, must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within 60 days from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider with your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404, Subpart J.

If you file an appeal, the Council will consider all of my decision, even the parts with which you agree. The Council will review your case if one of the reasons for review, listed in our regulations exists. Section 404.970 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my, decision more or less favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

If No Appeal And No Review On The Appeals Council's Own Motion

If you do not appeal and the Council does not review decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

Do You Have Any Questions?

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The local office that serves your area is 13911 Park Avenue, Ste. 110, Victorville, CA 92392.

cc:
Martin Taller, Attorney at Law
2099 State College, 102
Anaheim, CA 92806

NOTE TO PROCESSING CENTER
FURTHER ACTION NECESSARY

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Raymond D. Rolen	Period of Disability and Disability-Insurance Benefits
(Claimant)	
	573-66-8753
(Wage Earner)	(Social Security Number)

PROCEDURAL HISTORY

This case is before the Administrative Law Judge on a request for hearing filed by the claimant, who is dissatisfied with the previous determinations finding that the claimant is not disabled. After proper notice, a hearing was held on January 15, 1998. The claimant appeared and testified. Also testifying was Lloyd Tom, Medical Expert, David Rinehart, Vocational Expert and Jack Robinson, Friend. The claimant is represented by Martin Taller, Attorney at Law.

ISSUE

The issues in this case are whether the claimant is under a disability as defined by the Social Security Act and if so, when the disability commenced, the duration of the disability, and if required, whether the insured status requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

EVALUATION OF THE EVIDENCE

After a thorough evaluation of the entire record, it is concluded that the claimant has been disabled since October 10, 1989, and met the insured status requirements of the Social Security Act on that date and thereafter, through the date of this decision.

The claimant has not engaged in any substantial gainful activity since the disability onset date. The claimant has Status Post Lumbar Laminectomy with Spinal Stenosis, which is considered to be "severe" under the Social Security Regulations. The claimant's impairment is attended with the equivalent findings as Medical Listing 1.05(c), 20 CFR Part 404, Appendix I to Subpart P. The claimant is disabled within the meaning of the Social Security Act and Regulations.

The Medical Expert, a board certified orthopaedic surgeon, testified at the hearing that the claimant's orthopaedic impairment equaled in severity listing 1.05(c) from the onset date of October 10, 1989 through the present. On motion of the attorney and for good cause shown the prior application dated March 1, 1991 is reopened. Medical improvement is not anticipated to improve the claimant's condition.

FINDINGS

After consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant met the insured status requirements of the Act on October 10, 1989. The claimant has not performed any substantial gainful activity since October 10, 1989.

2. The claimant's impairment which is/are considered to be "severe" under the Social Security Act is Status Post Lumbar Laminectomy with Spinal Stenosis.

3. The claimant's impairment is attended with the same signs and findings as those published in 20 CFR Part 404, Appendix 1 to Subpart P. (Listing of Impairments).

4. The claimant has been under a disability since October 10, 1989.

DECISION

Based on the application filed on March 1, 1991 & May 8, 1996, the claimant is entitled to a period of disability commencing October 10, 1989, and to disability insurance benefits under sections 216(i) and 223 of the Social Security Act, respectfully, and the claimant's disability has continued at least through the date of this decision.

/s/ Dennis T. Bennett
DENNIS T. BENNETT
U.S. Administrative Law Judge

January 20, 1998

APPENDIX G

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Refer to: 573-66-8753

Social Security Administration
Office of Hearings and Appeals
699 N. Arrowhead Ave., Ste. 205
San Bernardino, CA 92401-1176
(714) 383-5545

Raymond Rolen
P.O. Box 720608
Pinon Hills, CA 92372

NOTICE OF DISMISSAL
PLEASE READ CAREFULLY

If you disagree with the enclosed order of dismissal, you have the right to appeal. When, you appeal, you request the Appeals Council to review the order.

You must file your appeal within 60 days from the date you receive this notice. (It will be presumed that you receive the notice within 5 days after the date shown below, unless you show us that you did not receive it within the 5-day period.)

You (or your representative) have to ask for the appeal in writing. You may sign a form HA-520, called "Request for Review by the Appeals Council," or write a letter.

You may submit your appeal to your local Social Security office, a hearing office, or mail it directly to the Appeals Council, Office of Hearings and Appeals, P.O. Box 3200, Arlington, VA 22203.

Your Right To Representation

You may appoint an attorney or other qualified person to represent you in any appeal you may file with the Appeals Council. Your local Social Security office has a list of groups that can help you find an attorney.

Some private, attorneys do not charge a fee unless you receive benefits. Some legal services organizations can provide legal services free of charge if you meet the organizations qualifying requirements. A representative may not collect a fee for services performed in representing you in dealing with us unless we have approved the fee. If you appoint an attorney to represent you, we may withhold up to 25 percent of any past-due benefits won on appeal to permit direct payment, of all or part of an approved fee.

This notice and the enclosed copy of
order of dismissal mailed

JUL 30, 1992

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

ORDER OF DISMISSAL

IN THE CASE OF	CLAIM FOR
Raymond Rolen (Claimant)	Period of Disability and Disability Insurance Benefits 573-66-8753
(Wage Earner)	(Social Security Number)

The claimant filed an application for Title II disability benefits which was denied initially and on reconsideration, the reconsidered denial notice being dated March 3, 1992. The claimant did not file his request for hearing until May 11, 1992 which is not within the 60 days required by section 404.933 of Social Security Administration Regulations No. 4 Section 404.957(c)(3) of the Regulations provides that a request for hearing may be dismissed when it bas not been timely filed unless the time for filing is extended or the tardy filing excused for good cause shown pursuant to other sections of the Regulations.

In an attempt to justify the tardy filing the claimant submitted a statement on form SSA 795 dated July 3, 1992. The reasons stated therein do not establish any good cause to extend the time for filing or to excuse the tardy filing. The reference to spending time in Los Angeles with his parents and ex-wife is vague and imprecise as to dates and in any event provides no reason why the claimant could not have filed in a timely fashion. With respect to the last paragraph of this statement there is no documentation whatsoever that the reconsidered denial notice was not received in usual course of post. It was mailed to a Post Office box which the claimant had provided to the Social Security Administration as his address at the

time of filing the request for reconsideration. The fact that the claimant may not have gone to the box to retrieve his mail until March 12, 1992 does not provide any evidence that the determination was not received in the Post Office box within the 5 days provided by the Regulations.

The reconsidered determination notice contained clear and unambiguous language in bold face type which explained to the claimant his right to a hearing and also explained the time limitation within which a request for hearing had to be filed.

The clerical worker of the servicing branch office who received the request for hearing checked it as being timely filed. That is not a judgment to be made by district office clerical personnel but rather by an Administrative Law Judge and as stated I find that the declaration of July 3, 1992 does not contain any evidence which would establish good cause to excuse the tardy filing or to extend the time for filing. Hence the request for hearing should be dismissed pursuant to the sections of the Regulations cited herein.

DISMISSAL

For the foregoing reasons it is ordered that the claimant's request for hearing filed herein on May 11, 1992 be and it is hereby dismissed and the reconsideration determination of March 3, 1992 remains as the final determination of the Secretary of Health and Human Services herein.

/s/ F. Keith Varni
F. KEITH VARNI
Administrative Law Judge
Office of Hearings and Appeals
699 N. Arrowhead Ave., Ste 205
San Bernardino, CA 92401

JUL 30, 1992

APPENDIX H

DEPARTMENT OF HEALTH AND HUMAN SERVICES ADMINISTRATION
DEPARTMENT OF HEARINGS AND APPEALS

[Received July 14, 1992]

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1. Claimant: Raymond D. Rolen

3. Soc. Sec. Claim Number: 573-66-8753

5. I request a hearing before an Administrative Law Judge, I disagree with the determination made on my claim because: I feel that with the introduction of additional medical evidence along with personal testimony that Social Security benefits may be granted.

6. Check one of these blocks.

☐ I have no additional evidence to submit.

■ I have additional evidence to submit. (Please submit it to the Social Security Office within 10 days.)

7. Check one of the blocks:

■ I wish to appear at a hearing.

☐ I do not wish to appear and I request that a decision be made based on the evidence in my case. (Complete Waiver Form HA-4608)

[You should complete No. 8 and your representative (if any) should complete No. 9. If you are represented and your representative is not available to complete this form, you should also print his or her name, address, etc. in No. 9.]

8. /s/ Raymond D. Rolen
P.O. Box 720608
Pinon Hills, CA 92372
Message (310) 834-7520
5/11/92

10. Request for Hearing RECEIVED for the Social Security Administration on 5/11/92 by: Illegible 1404 Park Ave.,

14. Check One: ■ Initial Entitlement Case
☐ Disability Cessation Case
☐ Other Postentitlement Case

15. ■ Disability—worker or child only (DIWC)

16. HO COPY SENT TO: 5097 HO on 7/11/92

APPENDIX I

BEFORE THE APPEALS COUNCIL,
OFFICE OF HEARINGS AND APPEALS
SOCIAL SECURITY ADMINISTRATION

SS#: 573-66-8753

RAYMOND ROLEN,

Claimant.

DECLARATION OF RAYMOND ROLEN

I, Raymond Rolen, declare:

I filed my first application for Social Security disability benefits on March 1, 1991. After that I received a denial notice dated September 11, 1991, which I appealed. In March 1992, I received the reconsideration denial.

Around this time, I was very frustrated because, despite my overwhelming desire to get better, my back condition did not improve. I saw a mental therapist after my injury in 1989, and the following year or two, because I continued to be depressed and was in a state of denial about my condition. I was later evaluated by psychiatrists and psychologists in 1991 and 1992. Also, I underwent some psychological tests during that period, but did not undergo further mental therapy at that time.

When I went to the Social Security office on May 11, 1992, to file a Request for Hearing, I had just returned from Wilmington, California, which was about 100 miles from my home, where I was house-sitting for my mother.

I believe I accurately stated the reasons for my filing late in my statement dated July 3, 1992. I would add, however, that due to my mental and emotional state, and

discouragement and frustration about not getting better, I had difficulty organizing my affairs. At the end of the period which I had to appeal I was called away from my home. My mother lived close to the violent outbreaks during the Rodney King-related riots in Los Angeles which started on Monday, April 30, 1992. My mother called me and told me she felt that she needed to go away and asked me to watch her house. I packed a few things and drove (with difficulty) to her home. I did not bring my Social Security paperwork with me and didn't know if another office would be able to help me properly. I was not feeling physically able to go home just to check my paperwork, nor could I leave my mother's house in light of the dangers related to the riots. Only when I returned home did I recognize that the deadline had passed. I then went the following day to the local Social Security office.

When I received the judge's Dismissal Decision dated July 31, 1992, I was very distraught. I read the statement in the decision that my request for hearing was dismissed and that "the reconsideration determination of March 3, 1992, remains as the final determination" in my claim and thought that was the end of the claim. I did not re-read the reconsideration decision and did not know about my eligibility to file a new application. I accepted the Judge's words that the prior denial decision was final. Although the decision said that I could appeal to the Appeals Council, the Judge didn't even talk about my disability in his decision so I didn't know what was needed in order to pursue this appeal.

Also, this dismissal order compounded my already fragile emotional state and, without any guidance, I did not feel physically or emotionally able to question or pursue the matter further at this time. I felt that I had been let down and "beaten" again.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of December, 1998, at Anaheim, California.

/s/ Raymond D. Rolen
RAYMOND ROLEN

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

STATEMENT OF CLAIMANT OR OTHER PERSON

NAME OF WAGE EARNER, SELF EMPLOYED, PERSON, OR SSI CLAIMANT	SOCIAL SECURITY NUMBER
Raymond D. Rolen	573-66-8753
NAME OF PERSON MAKING STATEMENT	RELATIONSHIP TO WAGE EARNER SELF-EMPLOYED PERSON, OF SSI CLAIMANT

Understanding that this statement is for the use of the Social Security Administration, I hereby certify that—

July 3, 1992

Mrs. Del Pozo:

Received your letter requesting reason for late filing on Monday June 15, 1992. Upon review of my file you will find that all my requests have been filed near the deadline. The reason for this is, contrary to all evidence, I am maintaining hope that my physical condition will improve to the point that I will be able once again to enter the job market, exactly as my Treating Physician and my Neurosurgeon assured me that I could, probably within 6 months of my surgery. Obviously they were mistaken.

I am also spending a great deal of my time in Los Angeles both to assist my parents as well as visiting my ex-wife, currently hospitalized with multiple spinal-cord infections in addition to lung lesions.

I realize that my personal problems as well as my Military Service and Taxpayer status since 1968 do not entitle me to any special consideration, but I am not asking for anything

extra, simply an opportunity to submit additional evidence and a chance to appear before an Administrative Law Judge.

It is my hope that the SSA will see fit to accord me these Appeal privileges.

One last point; I am not at all certain that this Appeal was, in fact, filed late due to the fact that I did not receive your Notification of Denial until March 12, 1992.

Awaiting Your Reply,

Raymond D. Rolen

I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law and/or State law. I affirm that all information I have given in this document is true.

SIGNATURE OF PERSON MAKING STATEMENT

Signature:	Date: 7-3-1992
/s/ Raymond D. Rolen RAYMOND D. ROLEN	Telephone Number: (619) 868-5541
Mailing Address: P O Box 720608	
City and State: Pinton Hill, CA	Zip Code: 92372

APPENDIX J

TITLE 20—EMPLOYEES' BENEFITS

CHAPTER III—SOCIAL SECURITY ADMINISTRATION

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

SUBPART G—FILING OF APPLICATIONS AND OTHER FORMS

DEEMED FILING DATE BASED ON MISINFORMATION

20 CFR 404.633

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§ 404.633 Deemed filing date in a case of misinformation.

(a) General. You may have considered applying for monthly benefits for yourself or for another person, and you may have contacted us in writing, by telephone or in person to inquire about filing an application for these benefits. It is possible that in responding to your inquiry, we may have given you misinformation about your eligibility for such benefits, or the eligibility of the person on whose behalf you were considering applying for benefits, which caused you not to file an application at that time. If this happened, and later an application for such benefits is filed with us, we may establish an earlier filing date under this section.

Example 1: Mrs. Smith, a widow of an insured individual, contacts a Social Security office when she reaches age 60 to inquire about applying for widow's insurance benefits. She is told by an SSA employee that she must be age 62 to be eligible for these benefits. This information, which was incorrect, causes Mrs. Smith not to file an application for benefits. When Mrs. Smith reaches age 62, she again contacts a Social Security office to ask about filing for widow's insurance benefits and learns that she could have received the benefits at age 60. She files an application for these benefits,

provides the information required under paragraph (f) of this section to show that an SSA employee provided misinformation, and requests a deemed filing date based on the misinformation which she received from an SSA employee when she was age 60.

Example 2: Ms. Hill, a 22-year-old, is forced to stop work because of illness. When she contacts a Social Security office to inquire about applying for disability insurance benefits, she is told by an SSA employee that she must have 20 quarters of coverage out of the last 40 calendar quarters to be insured for disability insurance benefits. The employee fails to consider the special rules for insured status for persons who become disabled before age 31 and, consequently, tells Ms. Hill that she is not insured because she only has 16 quarters of coverage. The misinformation causes Ms. Hill not to file an application for disability insurance benefits. Because of her illness, she is unable to return to work. A year later, Ms. Hill reads an article that indicates that there are special rules for insured status for young workers who become disabled. She again contacts a Social Security office to inquire about benefits based on disability and learns that she was misinformed earlier about her insured status. She files an application for disability insurance benefits, provides the information required under paragraph (f) of this section to show that an SSA employee provided misinformation, and requests a deemed filing date based on the misinformation provided to her earlier.

(b) Deemed filing date of an application based on misinformation. Subject to the requirements and conditions in paragraphs (c) through (g) of this section, we may establish a deemed filing date of an application for monthly benefits under the following provisions.

(1)(i) If we determine that you failed to apply for monthly benefits for yourself because we gave you misinformation about your eligibility for such benefits, we

will deem an application for such benefits to have been filed with us on the later of—

(A) The date on which the misinformation was provided to you; or

(B) The date on which you met all of the requirements for entitlement to such benefits, other than the requirement of filing an application.

(ii) Before we may establish a deemed filing date of an application for benefits for you under paragraph (b)(1)(i) of this section, you or a person described in § 404.612 must file an application for such benefits. If you die before an application for the benefits is filed with us, we will consider establishing a deemed filing date of an application for such benefits only if an application for the benefits is filed with us by a person who would be qualified to receive any benefits due you.

(2)(i) If you had authority under § 404.612 to sign an application for benefits for another person, and we determine that you failed to apply for monthly benefits for that person because we gave you misinformation about that person's eligibility for such benefits, we will deem an application for such benefits to have been filed with us on the later of—

(A) The date on which the misinformation was provided to you; or

(B) The date on which the person met all of the requirements for entitlement to such benefits, other than the requirement of filing an application.

(ii) Before we may establish a deemed filing date of an application for benefits for the person under paragraph (b)(2)(i) of this section, you, such person, or another person described in § 404.612 must file an application for such benefits. If the person referred to in paragraph (b)(2)(i) of this section dies before an application for the benefits is filed with

us, we will consider establishing a deemed filing date of an application for such benefits only if an application for the benefits is filed with us by a person who would be qualified to receive any benefits due the deceased person.

(c) Requirements concerning the misinformation. We apply the following requirements for purposes of paragraph (b) of this section.

(1) The misinformation must have been provided to you by one of our employees while he or she was acting in his or her official capacity as our employee. For purposes of this section, an employee includes an officer of SSA.

(2) Misinformation is information which we consider to be incorrect, misleading, or incomplete in view of the facts which you gave to the employee, or of which the employee was aware or should have been aware, regarding your particular circumstances, or the particular circumstances of the person referred to in paragraph (b)(2)(i) of this section. In addition, for us to find that the information you received was incomplete, the employee must have failed to provide you with the appropriate, additional information which he or she would be required to provide in carrying out his or her official duties.

(3) The misinformation may have been provided to you orally or in writing.

(4) The misinformation must have been provided to you in response to a specific request by you to us for information about your eligibility for benefits or the eligibility for benefits of the person referred to in paragraph (b)(2)(i) of this section for which you were considering filing an application.

(d) Evidence that misinformation was provided. We will consider the following evidence in making a determination under paragraph (b) of this section.

(1) Preferred evidence. Preferred evidence is written evidence which relates directly to your inquiry about your eligibility for benefits or the eligibility of another person and which shows that we gave you misinformation which caused you not to file an application. Preferred evidence includes, but is not limited to, the following—

(i) A notice, letter or other document which was issued by us and addressed to you; or

(ii) Our record of your telephone call, letter or in-person contact.

(2) Other evidence. In the absence of preferred evidence, we will consider other evidence, including your statements about the alleged misinformation, to determine whether we gave you misinformation which caused you not to file an application. We will not find that we gave you misinformation, however, based solely on your statements. Other evidence which you provide or which we obtain must support your statements. Evidence which we will consider includes, but is not limited to, the following—

(i) Your statements about the alleged misinformation, including statements about—

(A) The date and time of the alleged contact(s);

(B) How the contact was made, e.g., by telephone or in person;

(C) The reason(s) the contact was made;

(D) Who gave the misinformation; and

(E) The questions you asked and the facts you gave us, and the questions we asked and the information we gave you, at the time of the contact;

(ii) Statements from others who were present when you were given the alleged misinformation, e.g., a neighbor who accompanied you to our office;

(iii) If you can identify the employee or the employee can recall your inquiry about benefits—

(A) Statements from the employee concerning the alleged contact, including statements about the questions you asked, the facts you gave, the questions the employee asked, and the information provided to you at the time of the alleged contact; and

(B) Our assessment of the likelihood that the employee provided the alleged misinformation;

(iv) An evaluation of the credibility and the validity of your allegations in conjunction with other relevant information; and

(v) Any other information regarding your alleged contact.

(e) Information which does not constitute satisfactory proof that misinformation was given. Certain kinds of information will not be considered satisfactory proof that we gave you misinformation which caused you not to file an application. Examples of such information include—

(1) General informational pamphlets that we issue to provide basic program information;

(2) The Personal Earnings and Benefit Estimate Statement that is based on an individual's reported and projected earnings and is an estimate which can be requested at any time;

(3) General information which we review or prepare but which is disseminated by the media, e.g., radio, television, magazines, and newspapers; and

(4) Information provided by other governmental agencies, e.g., the Department of Veterans Affairs, the Department of Defense, State unemployment agencies, and State and local governments.

(f) Claim for benefits based on misinformation. You may make a claim for benefits based on misinformation at any time. Your claim must contain information that will enable us to determine if we did provide misinformation to you about your eligibility for benefits, or the eligibility of a person on whose behalf you were considering applying for benefits, which caused you not to file an application for the benefits. Specifically, your claim must be in writing and it must explain what information was provided; how, when and where it was provided and by whom; and why the information caused you not to file an application. If you give us this information, we will make a determination on such a claim for benefits if all of the following conditions are also met.

(1) An application for the benefits described in paragraph (b)(1)(i) or (b)(2)(i) of this section is filed with us by someone described in paragraph (b)(1)(ii) or (b)(2)(ii) of this section, as appropriate. The application must be filed after the alleged misinformation was provided. This application may be—

(i) An application on which we have made a previous final determination or decision awarding the benefits, but only if the claimant continues to be entitled to benefits based on that application;

(ii) An application on which we have made a previous final determination or decision denying the benefits, but only if such determination or decision is reopened under § 404.988; or

(iii) A new application on which we have not made a final determination or decision.

(2) The establishment of a deemed filing date of an application for benefits based on misinformation could result in the claimant becoming entitled to benefits or to additional benefits.

(3) We have not made a previous final determination or decision to which you were a party on a claim for benefits based on alleged misinformation involving the same facts and issues. This provision does not apply, however, if the final determination or decision may be reopened under § 404.988.

(g) Effective date. This section applies only to misinformation which we provided after December 1982. In addition, this section is effective only for benefits payable for months after December 1982.

HISTORY: [59 FR 44924, Aug. 31, 1994]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

Secs. 202 (i), (j), (o), (p), and (r), 205(a), 216(i)(2), 223(b), 228(a), and 702(a)(5) of the Social Security Act (42 U.S.C. 402 (i), (j), (o), (p), and (r), 405(a), 416(i)(2), 423(b), 428(a), and 902(a)(5)).

TITLE 20—EMPLOYEES' BENEFITS

CHAPTER III—SOCIAL SECURITY ADMINISTRATION

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

SUBPART G—FILING OF APPLICATIONS AND OTHER FORMS

FILING DATE BASED ON WRITTEN STATEMENT

20 CFR 404.630

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§ 404.630 Use of date of written statement as filing date.

If a written statement, such as a letter, indicating your intent to claim benefits either for yourself or for another person is filed with us under the rules stated in § 404.614, we will use the filing date of the written statement as the filing date of the application, if all of the following requirements are met:

(a) The statement indicates an intent to claim benefits.

(b) The statement is signed by the claimant, the claimant's spouse, or a person described in § 404.612. If you telephone us and advise us that you intend to file a claim but cannot file an application before the end of the month, we will prepare and sign a written statement if it is necessary to prevent the lossof benefits.

(c) The claimant files an application with us on an application form as described in § 404.611, or one is filed for the claimant by a person described in § 404.612, within 6 months after the date of a notice we will send advising of the need to file an application. We will send the notice to the claimant. However, if it is clear from the information we receive that the claimant is a minor or is mentally incompetent, we will send the notice to the person whosubmitted the written statement.

(d) The claimant is alive when the application is filed; or if the claimant has died after the written statement was filed, an application is filed—

(1) By or for a person who would be eligible to receive benefits on the deceased's earnings record;

(2) By a person acting for the deceased's estate; or

(3) If the statement was filed with a hospital under § 404.632, by thehospital if—

(i) No person described in paragraph (d) (1) or (2) of this section can be located; or

(ii) A person described in paragraphs (d) (1) or (2) of this section is located but refuses or fails to file the application unless the refusal or failure to file is because it would be harmful to the deceased person or the deceased's estate.

HISTORY: 44 FR 37209, June 26, 1979.

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

Secs. 202 (i), (j), (o), (p), and (r), 205(a), 216(i)(2), 223(b), 228(a), and 702(a)(5) of the Social Security Act (42 U.S.C. 402 (i), (j), (o), (p), and (r), 405(a), 416(i)(2), 423(b), 428(a), and 902(a)(5)).

TITLE 20—EMPLOYEES' BENEFITS

CHAPTER III—SOCIAL SECURITY ADMINISTRATION

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

SUBPART J—DETERMINATIONS, ADMINISTRATIVE REVIEW PROCESS, AND REOPENING OF DETERMINATIONS AND DECISIONS

APPEALS COUNCIL REVIEW

20 CFR 404.976

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§ 404.976 Procedures before Appeals Council on review.

(a) Limitation of issues. The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) Evidence.

(1) The Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision. If you submit evidence which does not relate to the period on or before the date of the administrative law judge hearing decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the additional evidence and will advise you of your right to file a new application. The notice returning the evidence to you will also advise you that if you file a new application within 6 months after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits in accordance with § 404.630. If a new application is filed within 6 months of this notice, the date of the request for review will be used as the filing date for your application.

(2) If additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights.

(c) Oral argument. You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 days before the scheduled date.

HISTORY: [45 FR 52081, Aug. 5, 1980, as amended at 52 FR 4004, Feb. 9, 1987]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

Secs. 201(j), 205(a), (b), (d)-(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405(a), (b), (d)-(h), and (j), 421, 425, and 902(a)(5)); 31 U.S.C. 3720A; § 5, Pub. L. 97-455, 96 Stat. 2500 (42 U.S.C. 405 note); § 5, 6(c)-(e), and 15, Pub. L. 98-460, 98 Stat. 1802 (42 U.S.C. 421 note).

TITLE 20—EMPLOYEES' BENEFITS

CHAPTER III—SOCIAL SECURITY ADMINISTRATION

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

SUBPART J—DETERMINATIONS, ADMINISTRATIVE REVIEW PROCESS, AND REOPENING OF DETERMINATIONS AND DECISIONS

REOPENING AND REVISING DETERMINATIONS AND DECISIONS

20 CFR 404.988

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§ 404.988 Conditions for reopening.

A determination, revised determination, decision, or revised decision may be reopened—

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within four years of the date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case; or

(c) At any time if—

(1) It was obtained by fraud or similar fault (see § 416.1488(c) of this chapter for factors which we take into account in determining fraud or similar fault);

(2) Another person files a claim on the same earnings record and allowance of the claim adversely affects your claim;

(3) A person previously determined to be dead, and on whose earnings record your entitlement is based, is later found to be alive;

(4) Your claim was denied because you did not prove that a person died, and the death is later established—

(i) By a presumption of death under § 404.721(b); or

(ii) By location or identification of his or her body;

(5) The Railroad Retirement Board has awarded duplicate benefits on the same earnings record;

(6) It either—

(i) Denies the person on whose earnings record your claim is based gratuitous wage credits for military or naval service because another Federal agency (other than the Veterans Administration) has erroneously certified that it has awarded benefits based on the service; or

(ii) Credits the earnings record of the person on which your claim is based with gratuitous wage credits and another Federal agency (other than the Veterans Administration) certifies that it has awarded a benefit based on the period of service for which the wage credits were granted;

(7) It finds that the claimant did not have insured status, but earnings were later credited to his or her earnings record to correct errors apparent on the face of the earnings record (section 205(c)(5)(C) of the Act), to enter items transferred by the Railroad Retirement Board, which were credited under the Railroad Retirement Act when they should have been credited to the claimant's Social Security earnings record (section 205(c)(5)(D) of the Act), or to correct errors made in the allocation of wages or self-employment income to individuals or periods (section 205(c)(5)(G) of the Act), which would have given him or her insured status at the time of the determination or decision if the earnings had been credited to his or her earnings record at that time, and the evidence of these earnings was in our possession or the possession of the Railroad Retirement Board at the time of the determination or decision;

(8) It is wholly or partially unfavorable to a party, but only to correct clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made;

(9) It finds that you are entitled to monthly benefits or to a lump sum death payment based on the earnings of a deceased person, and it is later established that:

(i) You were convicted of a felony or an act in the nature of a felony for intentionally causing that person's death; or

(ii) If you were subject to the juvenile justice system, you were found by a court of competent jurisdiction to have intentionally caused that person's death by committing an act which, if committed by an adult, would have been considered a felony or an act in the nature of a felony;

(10) It either—

(i) Denies the person on whose earnings record your claim is based deemed wages for internment during World War II because of an erroneous finding that a benefit based upon the internment has been determined by an agency of the United States to be payable under another Federal law or under a system established by that agency; or

(ii) Awards the person on whose earnings record your claim is based deemed wages for internment during World War II and a benefit based upon the internment is determined by an agency of the United States to be payable under another Federal law or under a system established by that agency; or

(11) It is incorrect because—

(i) You were convicted of a crime that affected your right to receive benefits or your entitlement to a period of disability; or

(ii) Your conviction of a crime that affected your right to receive benefits or your entitlement to a period of disability is overturned.

HISTORY: [45 FR 52081, Aug. 5, 1980, as amended at 49 FR 46369, Nov. 26, 1984; 51 FR 18313, May 19, 1986; 59 FR 1634, Jan. 12, 1994; 60 FR 19165, Apr. 17, 1995]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

Secs. 201(j), 205(a), (b), (d)-(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405(a), (b), (d)-(h), and (j), 421, 425, and 902(a)(5)); 31 U.S.C. 3720A; § 5, Pub. L. 97-455, 96 Stat. 2500 (42 U.S.C. 405 note); § 5, 6(c)-(e), and 15, Pub. L. 98-460, 98 Stat. 1802 (42 U.S.C. 421 note).

TITLE 20—EMPLOYEES' BENEFITS

CHAPTER III—SOCIAL SECURITY ADMINISTRATION

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

SUBPART J—DETERMINATIONS, ADMINISTRATIVE REVIEW PROCESS, AND REOPENING OF DETERMINATIONS AND DECISIONS

REOPENING AND REVISING DETERMINATIONS AND DECISIONS

20 CFR 404.989

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§ 404.989 Good cause for reopening.

(a) We will find that there is good cause to reopen a determination or decision if—

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

HISTORY: 45 FR 52081, Aug. 5, 1980.

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:

Secs. 201(j), 205(a), (b), (d)-(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405(a), (b), (d)-(h), and (j), 421, 425, and 902(a)(5)); 31 U.S.C. 3720A; § 5, Pub. L. 97-455, 96 Stat. 2500 (42 U.S.C. 405 note); § 5, 6(c)-(e), and 15, Pub. L. 98-460, 98 Stat. 1802 (42 U.S.C. 421 note).

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER VII—SOCIAL SECURITY ACT

TITLE II—FEDERAL OLD-AGE, SURVIVIORS, AND DISABILITY INSURANCE BENEFITS

42 USCS § 405 (2002)

(g) Judicial review. Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by civil action commenced within sixty days after the mailing to him of notice of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision on within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States of the District of Columbia [United States District Court for the District of Columbia]. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transport of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The finding of the Commissioner of Social Security as to any fact, if supported by substantial evidence shall be conclusive, and shall be conclusive, and where a claim has been denied by the

Commissioner of Social Security or a decisions rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner of Social Security made for good cause shown before the commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence is of ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying of affirming was based. Such additional review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any charge in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

APPENDIX K

SOCIAL SECURITY ADMINISTRATION

GONZALEZ V. SULLIVAN

AR 92-7(9) (C.E. 1992)

UNITED STATES COURT OF APPEALS
OF THE NINTH CIRCUIT

September 30, 1992

OPINION:

General Information

Acquiescence Rulings (ARs) are published under the authority of the Commissioner of Social Security and explain how the Social Security Administration (SSA) will apply holdings of the United States Courts of Appeals which are at variance with the agency's national policies in adjudicating benefit claims under title II and title XVI of the Social Security Act and Part B of the Black Lung Benefits Act. ARs are effective upon publication, and the effective date is shown on the first page of each ruling. SSA will apply the holding(s) of the Court of Appeals as explained in the AR to other cases in the same circuit where the issues involved are the same.

ARs are published on a flow basis and may be purchased along with Social Security Rulings (SSRs) by annual subscription or by individual copy from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. ARs are also available for purchase in an annual Cumulative Edition which reproduces all of the ARs and all of the SSRs published during the year that have not been superseded. The prices of these materials change periodically and may be obtained by writing to the Superintendent of Documents at the above address.

An AR may be cited by referring to the ruling number and either to the date it was published or to the cumulative edition in which it appears. For example, AR number one for 1986, published on January 23, 1986, refers to a decision by the United States Court of Appeals for the Ninth Circuit and should be cited as AR 86-1(9) (1/23/86), or as AR 86-1(9) (C.E. 1986).

ISSUE: Whether an initial determination in the Social Security or Supplemental Security Income (SSI) programs must be reopened when the notice of the initial determination did not explicitly state that the failure to seek reconsideration results in a final determination, and the claimant did not pursue a timely appeal.

STATUTE/REGULATION/RULING CITATION: Section 205(b)(1) of the Social Security

Act (42 U.S.C. 405(b)(1)), 20 CFR 404.904, 404.905, 404.957(c)(1), 404.987, 404.988, 404.989, 416.1404, 416.1405, 416.1457(c)(1), 416.1487, 416.1488, 416.1489.

APPENDIX L

Office of Hearings and Appeals
Social Security Administrations (S.S.A.)
Department of Health and Human Services

Volume I

Division II: Administrative Law Judge Hearing

Subject: Dismissals

Chapter: I-2-400

June 30, 1994

Current through June 1997

I-2-415 HEARING REQUEST NOT TIMELY FILED

A. What Constitutes Timely Filing

When a request for hearing (RH) is received in the Hearing Office (HO), the HO staff determines whether it was timely filed. (See I-20-050), Timely Request for Hearing—Filing Requirements.)

B. When the RH Was Not Timely Filed—Determining Whether the Claimant had "Good Cause" for Untimely Filing.

If an HO receives an untimely filed RH, an ALJ must determine whether the claimant had "good cause" for the untimely filing. (See I-2-060, Good Cause for Late Filing.)

1. Good Cause is Shown.

If the ALJ determines that the claimant had "good cause," the ALJ will proceed with the actions necessary to complete the record issue a decision.

2. Insufficient Evidence to Determine Good Cause.

   If the ALJ finds that there is insufficient evidence or information to determine whether the claimant had "good cause," the ALJ may develop it (See I-2-060 C., Development Procedures for Determining "Good Cause.") or elect to obtain it at a hearing on the issue of "good Cause" for untimely filing.

3. "Good Cause" Not Shown.

   If the ALJ decides that the claimant did not have "good cause," the ALJ may dismiss the RH. The ALJ should:

   a. use Form HA-515, Order to be Used for Other than Preprinted Order, or Hearing Text Guide section p003 (macro 0016, entry d) to produce the order; and

   b. include in the dismissal order a complete rationale to explain why he or she has found that the claimant has not shown "good cause."

APPENDIX M

Office of Hearings and Appeals
Social Security Administrations (S.S.A.)
Department of Health and Human Services

Volume I

Division II: Administrative Law Judge Hearing

Subject: Dismissals

Chapter: I-2-400

June 30, 1994

Current through June 1997

I-2-430 DISMISSAL—NO RIGHT TO A HEARING (REVISED 06/94)

The Administrative Law Judge (ALJ) may dismiss a request for hearing (RH) if it was not filed by a proper claimant or there is otherwise no right to a hearing.

A. Proper Claimant (See I-2-415, Parties to the Hearing)

Generally, the ALJ will consider an RH to have been filed by a "proper claimant" if it was filed by:

1. a claimant to the initial, reconsideration or revised determinations;
2. an individual who was not a claimant to the initial, reconsideration or revised determinations, but who shows in writing that his or her rights may be adversely affected;
3. a duly appointed representative on behalf of a proper claimant; or
4. an individual who has filed an application for and pursued a claim on behalf of a proper claimant because that claimant is a minor child, mentally incompetent or physically unable to file a request for hearing.

B. Actions Which Must Precede a Right to a Hearing

A claimant has a right to a hearing if the claimant has received:

1. notice of a reconsideration or revised reconsideration determination; notice of revised initial determination in non-disability cases; or an ALJ's notice of proposed revised decision based on new evidence in title II, title XVI, title XVIII cases, or certain black lung benefits claims under the Federal Mine Safety and Health Act of 1977; or

2. an initial determination on the issue of waiver of overpayment if the field office (FO) is unable to conduct the personal conference or the claimant declines the personal conference to request and ALJ hearing in a combined overpayment reconsideration or waiver situation.

NOTE 1: When an ALJ determines that the claimant has not exhausted all earlier administrative procedures (i.e., the claimant has not received the required initial and reconsidered or revised determinations), the ALJ must find the claimant does not have the right to a hearing and dismiss the request for hearing.

NOTE 2: If a request for hearing includes or is based on issues for which the Social Security Administration (SSA) does not have jurisdiction, e.g., issues which are within the Jurisdiction of State agency (See I-2-210, Notice off Issues.) or the Internal Revenue Service (See I-2-235 Earnings Related Issues the Administrative Law Judge May and May Not Address—Jurisdiction.), the ALJ must rule on the issues for which SSA has jurisdiction, and dismiss the request for hearing with respect to the issues for which SSA does not have jurisdiction.

C. Dismissal Orders

1. Use Form HA-5273, Order of Dismissal—NO Reconsideration Determination, for the dismissal order when there has been no reconsideration in a title II or title XVIII case.

2. Use Form HA-5275—SI, Order of Dismissal—NO Reconsideration Determination, for the dismissal order when there has been no reconsideration in a title XVI initial (as opposed to cessation) claim.

3. In other cases, use Form HA-515, Order to be Used for Other that Preprinted Order, or the blank order provided in section p006 of the Hearing Text Guide (macro 0016, entry g). Exercise care to include the appropriate facts, pertinent statutory and regulatory authority, and supporting rationale.